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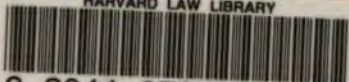
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GUMMERE IV.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

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AND, AT LAW, IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY.

CHARLES E. GUMMERE, Reporter.

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CASES DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW JERSEY.

JUNE TERM, 1916.

CARNEGIE STEEL COMPANY v. PATRICK CONNELLY.

Submitted December 2, 1915—Decided June 8, 1916.

1. Where defendant ordered a quantity of steel bars of special lengths over the telephone and afterward confirmed the order by letter, and the plaintiff accepted the order and performed its part of the contract, the defendant cannot thereafter set up in a court of justice as a defence to his breach of the contract that the letter was written under a mistaken understanding by him of what the real contract was, or that it contained statements that he did not intend to make.
2. The law will not permit the introduction of evidence by the defendant to show that information given by him to the plaintiff, and intended as the basis of action by the latter, and which has in fact been acted upon in conformity thereto, was unintentionally untrue, where the object is to throw a loss upon the plaintiff, who has changed his position, relying on the truth of such statements.

On plaintiff's rule to show cause.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE
and BERGEN.

VOL. LXXXIX.

Carnegie Steel Co. v. Connelly.89 N. J. L.

For the rule, *Lindabury, Depue & Faulks.*

Contra, Edwards & Smith.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. This was an action brought to recover the contract price of approximately fifty tons of steel bars agreed to be purchased by the defendant from the plaintiff on September 25th, 1914, for the price of \$1,280. The defence was that only ten tons of the steel bars had been delivered, and that there was no obligation on the defendant to pay for any greater amount.

The proofs showed that the order for the steel bars was given by the defendant personally over the telephone, and was received at the plaintiff company's office by one Bailey, a clerk in the office, who made a memorandum of it, item by item, as Mr. Connelly gave it. After this memorandum was made Bailey read the order back to the defendant, and asked him if it was correct, the latter replying that it was O. K. and to go ahead with the order. The price agreed upon at this conversation was two cents per pound. Bailey then asked for a confirmation of the order by letter. Connelly agreed to comply with this request, and sent the letter, in which he stated: "I accept your proposition of this date over wire of furnishing me with 1" steel bars, twisted, from your Waverly warehouse;" and then follows a specification of the number of pieces and their respective lengths. This specification makes up a total of approximately fifty tons of the bars. Upon the receipt of this letter, the defendant, being in a great hurry for the material, the order was at once put into execution, the deliveries being started on the next day after the receipt of the order. After about ten tons had been received by Mr. Connelly, he telephoned the plaintiff that he had received all of the rails he then needed, and that, if any more were intended to be shipped, there was a mistake in the order and that the plaintiff should cancel it. This the plaintiff refused to do, having cut the rails to special lengths in compliance

with the defendant's request. Later, the defendant having refused to pay for any of the steel bars in excess of the quantity actually received, the present suit was brought to recover the contract price of the fifty tons. The defence, as has already been indicated, was that Connelly in fact had only ordered ten tons; that his order had been misunderstood over the telephone, and that his letter of confirmation was written under a mistake of fact as to what the order really was. The finding of the jury was practically in favor of the defendant, repudiating the plaintiff's claim, except as to the amount of steel bars actually received and accepted by the defendant.

This verdict cannot be sustained. In the first place, the letter of confirmation, written by Connelly, specifying, item by item, the quantities of steel bars contracted for, was an affirmation of the terms of the contract as understood by the plaintiff, and entirely justified it in proceeding forthwith to execute the provisions thereof. Having declared the provisions of this contract, and thus induced the plaintiff to perform it according to the terms exhibited in this letter, the defendant cannot thereafter set up in a court of justice as a defence to his breach of it that the letter was written under a mistaken understanding of what the real contract was, or that it contained statements which he had not intended to make. The law will not permit the introduction of evidence by the defendant to show that information given by him to the plaintiff, and intended as the basis of action, by the latter, and which has in fact been acted upon in conformity thereto, was unintentionally untrue, where the object is to throw a loss upon the plaintiff, who has changed his position, relying on the truth of such statement. *Campbell v. Nichols*, 33 N. J. L. 81, 87.

In the second place, aside from the doctrine just adverted to, the great preponderance of the evidence is in favor of the conclusion that the contract was in fact that which was exhibited in Connelly's letter of confirmation, and that changed conditions in the work upon which he was engaged, and for the carrying on of which he had given the order for these steel

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bars, induced him to repudiate the contract which he had knowingly entered into with the plaintiff.

The rule to show cause will be made absolute.

RALPH D. EARLE, JR., RELATOR, v. HENRY W. DURHAM,
RESPONDENT.

Argued February 17, 1916—Decided June 8, 1916.

When, under the terms of the act commonly known as the Small Board of Freeholders act (*Pamph. L. 1912, p. 619*), a county adopts the provisions of that statute, all offices previously filled by former boards of freeholders become vacant on the first Monday of January next after the election of the "small board," irrespective of the terms of such offices or under what statutes they have been created.

On *quo warranto*. On demurrer to information.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the relator, *Gilbert Collins*.

Contra, John R. Hardin and Waldron M. Ward.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The relator by this writ challenges the appointment of the respondent as county engineer by the board of chosen freeholders of Bergen county on January 3d, 1916.

The voters of this county at the general election held in 1914 adopted the act of 1912 entitled "An act to reorganize the boards of chosen freeholders of the several counties of this state, reducing the membership thereof, fixing the salaries and providing for the election and terms of office of the mem-

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bers, and also for the appointment and terms of office of officers appointed by said boards" (*Pamph. L.*, p. 619), pursuant to a referendum provision contained therein. This statute is commonly known as the Small Board of Freeholders act. It provides, among other things, that whenever any county shall adopt its provisions, there shall be elected at the next following general election an entire new board, which shall meet and organize on the first Monday of January next after the election; that the terms of office of chosen freeholders of the county then in office shall expire on that day, notwithstanding that members thereof may have been chosen or elected for a period extending beyond that date; and that (section 6) the terms of office of all officers then holding office, under appointment by the board of chosen freeholders existing in such county, at the time of the reorganization of the board in such county "under this act," shall expire with the termination of office of the members of such previous board, notwithstanding that such officers may have been appointed for a longer term; and that all offices filled by appointment by such previous board shall then become vacant, and that the board of chosen freeholders constituted or elected under the provisions "of this act," shall forthwith upon their organization fill the offices thereby vacated for the term of one year.

The new board elected under this act organized on the 3d of January, 1916, and immediately appointed Mr. Durham, the respondent, as county engineer to succeed Mr. Earle, the relator, who up to that time was acting as such under a legal appointment made by a prior board. The latter contends that this procedure by the board of freeholders was not authorized by the act of 1912 for two reasons—*first*, because the county engineership of Bergen county is not an office within the purview of section 6 of the act of 1912; and *second*, because, even if it be an office, it does not come within the scope of that section, it having been created by an entirely independent statute, viz., the Road act, which provides the term for which the incumbent shall hold, and prescribes the duties and obligations thereof; and that by a supplement to

the Road act passed in 1912, some ten days later than the Small Board of Freeholders act, the county engineer is made a *quasi* state officer, and not subject to be removed by the board of freeholders, except upon the approval of the State Highway Commission.

The amendment of 1909 to the Road act (*Pamph. L., p. 316*) makes the county engineer an officer, and requires that "before assuming the duties of his office he shall take and subscribe an oath or affirmation that he will faithfully perform all the duties of his office to the best of his ability and understanding." If, therefore, the suggestion of the relator is that the county engineer does not hold an office, it is completely answered by the citation from this statute. If the contention is that, although an office, its incumbent is not affected by the change in the governmental machinery created by the Small Board of Freeholders act, we cannot concur in that view.

County offices are not all of them created by the act to incorporate the chosen freeholders in the respective counties of the state, or its supplements or amendments; nor are their terms, or the duties and obligations of their incumbents, fixed thereby. The legislature undoubtedly had this fact in mind when it declared, in section 6 above cited, that the terms of office of *all officers* then holding office under appointment by boards of freeholders should expire when the old board went out of office, and the new board came in; and that *all offices* filled by appointments by previous boards should then become vacant. The legislative scheme, as we perceive it, was that whenever the people of a county should adopt the act of 1912 as its charter, there should be a complete change in the personnel of the county government, and that upon the organization of the new board every officer who had been appointed by a preceding board should cease to hold his office, without regard to its character, or the length of its term, so that the new board of freeholders might have in every branch of the county government men of its own selection, and thus be unhampered by any conditions for the existence of which it was not responsible.

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What we have said with relation to the first contention of the relator practically disposes of that secondly made by him. This section of the Small Board act is not limited in its operation to such offices as may be called "county offices." The test provided by the statute is the method in which the office is filled. If the incumbent holds "under appointment by the board of chosen freeholders," then, no matter what the office be called, his term is brought to an end by the organization of the new board and his office becomes vacant *instantly*.

It is also suggested on behalf of the relator that the legislature cannot be presumed to have intended to embrace this particular office in the sweep made by section 6 of the act, because it provides that the new incumbent of any office filled by the board shall only hold for one year, and thus shortens the length of the term as provided in the Road Board act. We think the answer is that the first appointees to all offices embraced within the scope of section 6, without regard to the normal length of the term provided by the statutory provisions creating such offices, shall hold their respective offices for the term of one year only. The explanation of this provision of the statute is, as it seems to us, that the legislature appreciated the likelihood of the new board, in appointing at one and the same time incumbents to so many offices, discovering afterward that some at least, of their selections, were not up to the standard desired, and so provided for a short original term of equal length for every office holder, leaving it to the board of freeholders at the end of the year and when the defects in the governmental machine had become apparent, to make such changes in the incumbents of the various offices as their experience should then justify.

We conclude, therefore, that the respondent is entitled to judgment on the demurrer.

State v. Loomis.89 N. J. L.

THE STATE v. BRUCE E. LOOMIS ET AL.

Submitted March 16, 1916—Decided June 8, 1916.

1. By the Crimes act of this state it is a criminal offence for any person maliciously, or without lawful justification, and with intent to cause and procure the miscarriage of a woman pregnant with child, to administer to her, or prescribe for her, or advise or direct her to take or swallow any drug, medicine or noxious thing, &c., and it is immaterial in determining the guilt of one charged with a violation of this statutory provision whether the woman upon whom the offence is committed was or was not then "quick with child."
2. On the trial of an indictment for this statutory offence, it is sufficient for the state to prove that pregnancy existed and that the defendant had a suspicion of its existence and acted upon that suspicion in order to show an intent to produce a miscarriage.
3. A statement to the jury by the trial court in a criminal case, as to what the prosecution claimed the proofs showed with relation to a material fact in the case, is not legally objectionable.

On error to the Essex Oyer and Terminer.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the plaintiff in error, *Frank M. McDermit* and *Howe & Davis* (*Robert M. Moore*, of the New York bar, on the brief).

For the state, *Frederick F. Guild*, prosecutor of the pleas, and *Andrew Van Blarcom*, assistant prosecutor of the pleas.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The plaintiffs in error were convicted of the crime of abortion committed upon the body of one Marie Crogan. The case now being before us for review, the plaintiffs in error contend that the conviction against them should be reversed for various trial errors which will be considered in turn.

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The first ground of reversal urged by counsel in their brief is that, in order to sustain a conviction for the crime of abortion, there must be proof that the woman was quick with child, and that such proof was lacking in the present case. Counsel rely, in support of this contention, upon the case of *State v. Cooper*, 22 N. J. L. 52. In that case it was held that the causing or procuring of an abortion before the child is quick was not a criminal offence at common law, and had never been made such by statute in New Jersey. But almost immediately after the promulgation of the opinion in the cited case, the legislature passed a supplement to the Crimes act, making it a criminal offence for any person maliciously, or without lawful justification, and with intent to cause and procure the miscarriage of a woman then pregnant with child, to administer to her, or prescribe for her, or advise or direct her to take or swallow any drug, medicine or noxious thing, &c. At common law, as was pointed out in *State v. Cooper*, the offence was only against the life of the child. The enactment of the statute immediately afterward was largely to protect the health and life of the mother against the consequences of the act. And for this reason it was held by this court, in *State v. Murphy*, 27 *Id.* 112, that it was immaterial, in determining the guilt of the offender against the statute, whether the foetus had quickened or not; that in either event the degree of the defendant's guilt was the same. Although various changes in the statute were made between the time of its enactment and the Revision of 1898, there has been no change in the character of the offence, which, since then, has always been held to be complete if pregnancy existed. In that respect the Revision of 1898 (*Crimes act*, § 119) is identical in its language with the act of 1849. The first ground of reversal is, consequently, without merit.

It is next contended that the trial court erred in charging the jury that, although there could be no violation of the statute unless the woman was pregnant, it was not necessary to show, in order to prove intent to produce a miscarriage, that the defendant knew the woman was pregnant with child;

that it was sufficient if he entertained the belief or suspicion of her pregnancy. The argument of counsel is that "the state must not only prove pregnancy, but must also show that the defendants had a belief in its existence, because no abortion can be committed where there is no pregnancy, and no intent is proved where there is no belief in pregnancy." It thus appears that the portion of the instruction subjected to criticism is that it is sufficient to justify a finding that the defendant intended to violate the statute if he entertained "a suspicion of the woman's pregnancy." In delivering the instruction complained of the trial judge adopted the statement contained in *Powe v. State*, 48 N. J. L. 34, 36, which is as follows: "An intent to produce a miscarriage may exist without absolute knowledge of pregnancy. * * * And if there be a mere suspicion that pregnancy exists there may be an intent to cause a miscarriage if the suspected condition is in existence." We think this statement of the law unobjectionable. It would hardly do to say that an abortionist who merely suspects a condition of pregnancy, but has no belief either in its existence or non-existence, can escape the denunciation of the statute if, because of his suspicion, he operates for the purpose of producing a miscarriage in case the woman should be pregnant, and does, in fact, produce a miscarriage by the operation.

The next ground of reversal argued by counsel is that the court erred in charging the jury that there was some evidence tending to show that the defendant Loomis endeavored to keep Marie Crogan from the authorities with an idea of suppressing her testimony. Counsel asserts that this statement of the court was absolutely unsupported by fact. Our examination of the record of the proceedings had at the trial, and sent up with the writ of error, satisfies us that the statement of the judge was justified.

The next ground of reversal is that the court erroneously charged the jury that "the state contends that she (Marie Crogan) was treated with a medicine that Dr. Young gave her," &c., &c., and the argument is that this was not proved

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by the evidence in the case. But in the excerpt complained of the court was not undertaking to state any facts in proof, but merely what the contention of the state was. It is not suggested the court was in error in this statement, and, of course, there was nothing objectionable in referring to what the state's claim was.

There are other criticisms upon the charge contained in the reasons for reversal, but they involve questions already discussed, and require no further comment.

The remaining grounds of reversal are directed at rulings on evidence. The first is, that the court below improperly permitted the state to ask the witness Marie Crogan certain questions with relation to her testimony before the grand jury. It is not necessary to pass upon the question of the right of the state to introduce evidence of occurrences in the grand jury room, and the limitations upon that right, for the reason that, although the questions were asked and objected to, the record in the case shows that none of them were answered.

Lastly, counsel for the defendants assert that it was error for the court to allow the prosecutor of the pleas to recall Marie Crogan just before the close of the state's case, for the purpose of contradicting a statement made by another of the state's witnesses. Why counsel consider this judicial action to constitute error is not made plain in their brief; but it is enough to say, in disposing of the present contention, that the testimony was admitted, not only without objection on the part of the defendants, but without even a suggestion of its impropriety. This being so, there was no ruling by the court below upon the question of the admissibility of the evidence, and, of course, nothing for this court to review.

The judgment under review will be affirmed.

Stuart v. Burlington Co. Farmers' Exchange. 89 N. J. L.

JOHN C. STUART v. BURLINGTON COUNTY FARMERS'
EXCHANGE.

Submitted March 16, 1916—Decided June 8, 1916.

In an action for breach of warranty on a sale of fertilizers, the plaintiff was allowed to recover, under the instruction of the court, the difference between what the crop produced by the fertilizer actually was worth and what it would have been worth had the fertilizer been up to the warranty, and also the difference between the price paid for the fertilizer and what it was actually worth. *Held*, that such instruction was erroneous in that it permitted a double recovery; the difference in value of the crop produced and that which would have been produced had the fertilizer been as warranted being the full measure of the defendant's liability.

On appeal from the Burlington Circuit Court.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the appellant, *George M. Hillman*.

For the respondent, *John G. Horner*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. This action was brought by Stuart against the Exchange to recover compensation for the loss which he claimed to have sustained because of the fact that a certain fertilizer, which he had purchased from the defendant to be used in raising corn, was not of the grade warranted, but was of much inferior quality, and that as a result of its use upon his farm the crop of corn which he raised was much smaller than it would have been had the fertilizer been of the quality which he ordered, and what the defendant warranted it to be. The cost price of the fertilizer was \$280; the loss upon the crop which the plaintiff raised

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was claimed by him to have been about \$1,200. The trial resulted in a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant appeals.

The only ground of appeal argued before us is an alleged error in the instruction to the jury relating to the measure of damages. The court first charged that if there was a breach of warranty as to the quality of the fertilizer, and the seller knew the use to which it was to be put, he was answerable to the purchaser for the difference between the value of the crop produced by the fertilizer which was actually delivered, and the value of the crop that would have resulted in all reasonable probability had the fertilizer corresponded to the warranty. No criticism is made upon this part of the charge, but the court then proceeded to say that the plaintiff sought to recover, not only this difference in value, but also the money paid by him for the fertilizer, and then added "He cannot recover back the \$280 which he paid. That is not the law. The law is that his measure of damages is the difference between the price which he paid for the fertilizer and what it was worth * * * and the worth of it you will have to determine from the evidence." The effect of this added instruction was to permit a recovery of double damages. If the fertilizer had been what it was warranted to be, the crop produced would have been, according to the plaintiff's claim, \$1,200 more valuable than it turned out to be; and the plaintiff was allowed to recover this \$1,200 if the jury thought the difference was proved. Such a recovery would have made him exactly whole. That is, he would then have had in his pocket just what he would have had provided the fertilizer had strictly complied with the warranty. But when he was permitted, after being made whole, to recover also the difference between the contract price of the warranted fertilizer, and the value of that which was actually furnished, he was, in effect, allowed a discount upon the price of a fertilizer which, after the allowance of the compensation for the diminution of the crop was determined and allowed to him, was worth exactly what the warranted fertilizer was.

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This instruction was harmful error, and, as it is impossible to determine to what extent it entered into the making up of the verdict, the judgment under review must be reversed.

EGON VON NOVELLY ET AL. v. JOHN H. CARPENTER ET AL.

Submitted December 2, 1915—Decided June 8, 1916.

1. Under section 215 of the Practice act (*Comp. Stat.*, p. 4119), only fundamental questions may be certified to the Supreme Court; that is, questions the answers to which will enable the Circuit Court to render judgment for the one party or the other without any further proceedings in the cause on its part.
 2. The rule or order authorized by section 252 of the Practice act (*Comp. Stat.*, p. 4128), when made, transfers such matters as come within its purview to the Supreme Court for its consideration and determination.
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On case certified from the Hudson Circuit.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the plaintiffs, *Roe, Runyon & Autenreith*.

For the defendants, *Vredenburg, Wall & Carey*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The present action was brought to recover damages for breach of a contract. The complaint contains four counts. The defendants, contending that the second, third and fourth counts of the complaint to be bad, moved before the Circuit Court to strike them out. That court, conceiving that certain matters involved in the determination of the motion presented questions of doubt and difficulty, certified them to this court for its advisory opinion thereon.

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Section 215 of our Practice act (*Comp. Stat.*, p. 4119), which authorizes the Circuit Court to certify questions of doubt or difficulty, to be argued at the bar of the Supreme Court, provides that, after the Supreme Court has heard the same and certified its opinion thereon to the Circuit Court, the latter court "shall render judgment therein in conformity to such opinion." In *McDonald v. Central Railroad Co.*, 88 N. J. L. 11, we held that under this statutory provision only fundamental questions might be certified—that is, questions which are dispositive of the litigation and the answers to which will enable the Circuit Court to render judgment for the one party or the other without any further proceedings in the cause on its part. The questions certified in the present case are not of the character indicated. They only relate to the validity of certain counts in the complaint; and, even if those counts should be held to be bad, no final judgment can be entered in the cause either for or against the plaintiffs. The other counts of the complaint remain to be answered by the defendants, and on the issues thus formulated a trial must be had.

The Circuit Court judge has stated in the record sent to us that the questions were certified pursuant to section 252 of the Practice act (*Comp. Stat.*, p. 4128), which provides that "Any justice of the Supreme Court or judge of the Circuit Court, to whom application may be made for any rule or order by virtue of this act, may refer the same to the Supreme Court and make such order for the taking of testimony and for stay of proceedings as may be equitable." This section, however, does not contemplate the rendition of advice by the Supreme Court to a judge of the Circuit Court for his guidance in acting upon such application; but is intended to transfer such matters as come within its purview to the Supreme Court for its consideration and determination, and consequently affords no basis for the procedure adopted by the Circuit Court in the present case.

The certified case will be dismissed.

IN THE MATTER OF THE APPEAL OF WILLIAM P. VERDON
FROM AN ORDER ADJUDGING HIM GUILTY OF CON-
TEMPT OF THE HUDSON COUNTY COURT OF QUARTER
SESSIONS.

Argued April 3, 1916—Decided May 20, 1916.

1. The power of the Court of Quarter Sessions to punish contempts of court is derived wholly from the common law, which has neither been altered nor enlarged by statute in this state.
2. In a summary proceeding for contempt there can be no trial and hence there can be no witnesses against the accused nor a contradiction of his oath by that of others. The proper procedure in such cases is to bring the defendant into court to answer such interrogatories as shall there be exhibited against him. If his answers to the interrogatories show that no contempt has been committed, the party is entitled to his discharge; but if the contempt be admitted, the court shall then proceed to pronounce such judgment as the circumstances may require.
3. The procedure, as laid down by the common law, for the punishment of contempts of court is a part of the substantive law and not a rule of practice.
4. Courts of law can no more at their will adopt the chancery proceeding respecting matters of contempt than they can in any other matters respecting which the two courts radically differ.

On appeal from a judgment of contempt of court.

This is an appeal under the provisions of the act of April 17th, 1884 (2 *Comp. Stat.*, p. 1736), providing for the review by this court of summary convictions for contempt.

The appellant, William P. Verdon, was by the Hudson County Court of Quarter Sessions adjudged guilty of a contempt of that court by reason of certain newspaper publications and was sentenced to pay a fine of \$250, and to serve a term of thirty days in the county jail.

The proceeding, which was instituted by the Court of Quarter Sessions, resulted in the issuance by it of a rule to show cause requiring William P. Verdon and others to show cause why they should not be adjudged guilty as of a contempt of the Court of Quarter Sessions of Hudson County.

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At the hearing upon the return of this rule Verdon appeared by counsel, who moved the court to proceed against his client by the filing of interrogatories and not by the taking of testimony to try the question of contempt, citing the case of *In re Gonzales*, not at that time officially reported. The motion of Verdon's counsel was overruled and witnesses were called and examined by the assistant prosecutor over the objection of counsel for Verdon, who stated that his client stood mute as to any participation in such trial, excepting to say, "that we now offer to purge ourselves or to attempt to purge ourselves of contempt of court upon the exhibition to us of written interrogatories in accordance with the course of the common law," which offer was renewed when Verdon was called to the bar of the court for judgment. At no time were interrogatories exhibited to Verdon whose conviction of contempt rested wholly upon the testimony of witnesses. The present appeal challenges the legality of the conviction thus had.

Before Justices GARRISON, TRENCHARD and BLACK.

For the appellant, *Harlan Besson and Merritt Lane*.

For the state, *George T. Vickers*.

The opinion of the court was delivered by

GARRISON, J. The power of the Court of Quarter Sessions to punish contempts of court is derived wholly from the common law, which has been neither altered nor enlarged by statute in this state.

What the common law of England was at the time at which we derived it from the parent country is thus stated by Blackstone, who wrote at about that period: "If the contempt be committed in the face of the court the offender may be instantly apprehended and imprisoned at the discretion of the judges without any further proof or examination. But in matters that arise at a distance and of which the court cannot have so perfect a knowledge unless by the confession of the party

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or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him or in very flagrant instances of contempt the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge; and thereupon confirms and makes absolute the original rule. This process of attachment is merely intended to bring the party into court; and when there he must either stand committed or put to bail in order to answer upon oath to such interrogatories as shall be administered to him for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation and must by the course of the court be exhibited within the first four days and if any of the interrogatories are improper the defendant may refuse to answer it and move the court to have it struck out. If the party can clear himself upon oath he is discharged, but if perjured may be prosecuted for the perjury." Blackstone then alludes to the totally different procedure in courts of equity where, "after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by affidavits of the adverse party, whereas," he continues, "in courts of law the admission of the party to purge himself by oath is more favorable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed." This "method of examining the delinquent himself upon oath with regard to the contempt alleged" he concludes, "has by long and immemorial usage now become the law of the land." 4 *Bl. Com.* 287.

This accurately states the common law of England just prior to the American Revolution. That this immemorial usage underwent no change in its transplanting to the American states is shown by a decision of the Supreme Court of New York, while Kent was still Chief Justice. The court said: "The attachment by virtue of which he had been arrested, was nothing more than a process to bring him into court

to answer the interrogatories which upon the return of it were to be exhibited against him. This is necessary to be done in every case before the party can be convicted of a contempt. If the answers to the interrogatories show that no contempt has been committed, the party is entitled to his discharge; but if the contempt be admitted, the court proceed to pronounce such judgment as the circumstances of the case may require." *Jackson v. Smith*, 5 Johns. 115. To the same effect is the decision of all courts that proceed according to the course of the common law.

Before leaving the common law rule it may be well to advert to a matter that must occur to everyone who considers the subject, viz., the mildness, not to say ineffectiveness, of the manner in which contempts were dealt with in the law courts of England as compared with the severity of its criminal law in other respects. That this arose from any special sympathy with this particular offence is not to be thought of; on the contrary, of all criminal offences, this is probably the very one that the judges would have liked to punish in the most effective manner. The course pursued by the common law judges was evidently therefore not from choice but from compulsion and the nature and sources of such compulsion are not far to find. Contempt was a criminal offence and *Magna Charta* expressly forbade that any person should be tried for a criminal offence unless upon the indictment of the grand inquest. In the face of this prohibition there could be no trial by the court. The unwritten constitution of England likewise provided that no man could be compelled to give testimony against himself and it likewise prohibited one accused of crime from testifying in his own behalf. The net result of these fundamental restrictions was that in the summary proceeding for contempt there could be no trial and hence no witnesses, from which it followed that if the defendant was to be convicted in such summary proceeding it must be upon facts admitted by his own oath, the taking of which was justified upon the somewhat sophistical ground that the taking of such an oath by the defendant was not the giving of testimony, because if there was no trial there

could be no testimony, and hence the defendant was not a witness. For present purposes the significant feature of this common law procedure is that it excluded the idea of a trial of the accused either by witnesses against him or by the contradiction of his oath by that of others. As well stated by a recent writer, "The common law mode of proceeding in cases of contempt presents no question of fact to be tried by a jury. The defendant determines by his own answer, under oath, whether he is guilty of that which is charged against him as a contempt of court, and if he fails thereby to purge himself the court may at once impose the punishment." 6 R. C. L. 523. This procedure was obviously not a mere rule of convenience which the judges might follow or not as they saw fit; on the contrary, it was a stern and substantial necessity and hence a matter of substantive law.

In this state our earlier cases prior to the enactment of the statute permitting an appeal to this court uniformly recognize this common law rule by their references to it. *State v. Fisler*, 6 N. J. L. 305; *State v. Doty*, 32 Id. 403; *State v. Ackerson*, 25 Id. 209. There arose, however, no occasion for its formal restatement.

However, shortly after the passage of the act of 1884, the case *In re Cheesman*, 49 N. J. L. 115, was before this court, in which Mr. Justice Dixon, stating the procedure in contempt cases in the courts of law, concluded by saying, "the accused, on being brought in, should be either held to bail or committed to answer interrogatories; then that the interrogatories be exhibited and answered; and thereupon according as his answers confess or deny his guilt he should be punished or discharged." Cheesman, by affidavit, declared the truth of the charge against him before interrogatories were filed and they therefore were not filed, and this irregularity is condoned in the opinion upon the ground that "the appellant never intimated * * * that he was entitled to have an attachment issue or interrogatories filed." This opinion therefore accurately apprehends and states the common law rule that obtains in courts of law in this state. If it be said that this statement of the common law was *dictum*,

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it was, nevertheless, the considerate deliverance of a learned judge fresh from a thorough examination of the matter of which he spoke.

Such was the state of our decisions when the case *In re Gonzales* was decided by this court, Mr. Justice Parker delivering the opinion (88 N. J. L. 536). In that case the answers made by Gonzales to interrogatories exhibited to him by the court were not accepted as conclusive because of a contradiction between such answers and certain testimony that had been taken by the court as the basis for the issuance of a writ of attachment. Gonzales was found guilty of contempt by the Hudson Oyer and in reversing this judgment Mr. Justice Parker said: "On the whole, therefore, we think that appellant fully and fairly purged himself of any contempt, legally implied in the interrogatories, and which was testified to by the grand jury clerk. If his denial was adequate it must be taken as true. We think, therefore, that the finding that the appellant was guilty of contempt necessarily, and from a reading of the decision of the Oyer we should say confessedly, was based on the allegations in the testimony of the grand jury clerk, which were contradicted by appellant, and in the face of such contradiction. But the court had no right to weigh the evidence, as has just been pointed out. If the contradiction was full and adequate the appellant was entitled to his discharge." This decision, which accords full common law force to the defendant's answer to the interrogatories, cannot be reconciled with the proposition that the court may withhold the filing of interrogatories, and, against the protest of the accused, proceed to convict him upon evidence that would have been both inadmissible and nugatory if the court were proceeding to exercise its summary jurisdiction in the legitimate way.

Such proposition is in effect an assertion of the right of the Quarter Sessions to try one accused of a criminal offence at special sessions without his consent, and as such is open to all of the constitutional objections pointed out by Mr. Justice Depue in *Edwards v. State*, 45 N. J. L. 419. In

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fine, the repugnancy of the common law proceeding in contempt cases to our constitutional guaranties with respect to indictment by a grand jury and to trial by a petit jury is overcome solely by the existence of such arbitrary power as part of the common law which we have inherited, but this protection would not extend to a modern departure therefrom, that at the time of its adoption did violence to these sections of our bill of rights. Excepting it keep within its common law authority no court of law in this state can summarily convict and punish for a criminal contempt any more than it could convict and punish for any other criminal offence without indictment and trial by a petit jury. *Const. of N. J., art. 1, §§ 8, 9.*

The unbroken line of decision by which the rule of the common law has been preserved and handed down to us coupled with the insurmountable constitutional objections to the radical departure therefrom essayed in the present case compel the reversal of the judgment now before us, unless such a result is obviated by any of the following considerations submitted in behalf of the state:

The first of these is that the common law procedure was a mere rule of practice and not one of substantive law. This has already been disposed of both upon historical and constitutional grounds.

The second is that the proceedings of courts of equity in matters of contempt being more efficacious than the procedure in courts of law should be adopted by the latter. This rests upon the same footing as would the contention that because specific performance was more efficacious than a judgment for damages, the courts of law should adopt the former remedy in preference to its own. The difference between courts of law and courts of equity is in nothing more marked than in their methods of remedial redress, which in courts of equity were administered from the earliest period largely, if not wholly, by the process of contempt. This resulted from the fact that equity acted only *in personam*; hence, if a personal decree were not obeyed the only remedy was by a process of

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contempt to enforce obedience. Contempt was in fact in courts of equity what execution was in courts of law. Blackstone says, "The whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was, 'til the introduction of sequestration, in the nature of a process of contempt." Such process of contempt being thus normally a part of the remedy afforded by a court of equity to its suitors, it naturally followed that the issues of fact involved in this phase of the suit were tried as any other issues of fact were tried.

Hence, there arose a practice unknown to the courts of law, which became by long usage inveterate in the courts of equity in which it subsisted side by side with the totally different practice that we have been discussing in the courts of law during the same period. This distinction has been pointed out by every writer and by every decision dealing with the subject.

The continued maintenance of this practice in courts of equity in dealing with contempts that are in their essence not remedial but criminal, trenches upon debatable ground on which we should not enter—*first*, because it in nowise concerns the question before us; and *secondly*, because it concerns matter respecting which *dictum* of any sort would be ill advised. Enough has been said to show that courts of law can no more at their will adopt the chancery proceeding respecting matters of contempt than they can in any other matters respecting which the two courts radically differ.

Third and lastly, it is said that there are decisions in other jurisdictions holding that the court may dispense with the exhibition of interrogatories or may treat the answers thereto as inconclusive.

Such of the decisions cited as I have examined were either equity cases, or decisions of courts in which law and equity were intermingled, or else arose under constitutional or statutory alterations of the common law. If, however, it were otherwise it would not affect the question in hand, since it is not our judicial habit to ignore decisions of our own courts

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as to what the common law in this state is, in favor of the decisions of other states at variance therewith.

Finding nothing in the matters submitted for our consideration that in anywise militates against the conclusion we have reached, the judgment of the Hudson County Quarter Sessions convicting the appellant of contempt of court is reversed, and for nothing holden.

PUBLIC SERVICE RAILWAY COMPANY v. BOARD OF PUBLIC UTILITY COMMISSIONERS AND CITY OF PATERSON.

Argued December 12, 1915—Decided June 23, 1916.

The provisions of section 2 of the supplement to an act concerning public utilities, approved March 12th, 1913 (Fielder act, *Pamph. L.* 1913, p. 91), by which ten per centum of the expense of eliminating a grade crossing of a steam railroad used by a street railway may be ordered to be paid by the company operating such street railway, is within the legitimate sphere of legislation under the police power of the state.

On *certiorari*.

The order of the board of public utility commissioners, drawn under review as to one of its terms by this *certiorari*, is fully set out in the statement of facts prefaced to the opinion delivered at this term in the case of Erie Railroad Co. v. Board of Public Utility Commissioners.

Before Justices GARRISON, TRENCHARD and BLACK.

For the prosecutor, *Frank Bergen*.

For the defendants, *Edward F. Merrey* and *Frank H. Sommer*.

The opinion of the court was delivered by

GARRISON, J. The prosecutor of this writ, the Public Service Railway Company, objects to the order of the board of public utility commissioners imposing upon the prosecutor ten per centum of the cost incurred in abolishing grade crossings on three highways over which the prosecutor operates its cars. The reasons relied on by counsel, "briefly stated, are, that the burden which the order attempts to impose on the prosecutor is neither a tax nor an assessment, nor a legitimate exercise of the police power." Inasmuch as the order merely follows the statute, the attack is really upon the latter. The language of the statute is, that "the board may order not exceeding ten per centum of such expense directly chargeable to the crossing used by the street railway company to be paid by the company operating such street railway."

We agree that this imposition of a part of the expense of abolishing dangerous grade crossings is neither a tax nor an assessment for a public improvement, but, we think, that it is a legitimate exercise of the police power. The contention of counsel for the prosecutor is placed squarely upon the proposition that the police power is not legitimately exercised in the present case "unless the property (of the prosecutor) has become a public nuisance, and so lost its right to protection;" and he then proceeds to demonstrate that a street railway is not a public nuisance. We, of course, agree to this, but we entirely dissent from the narrow definition of the police power which would restrain its exercise to the case of property that had become in a legal sense a nuisance.

If such a narrow definition has any place in the doctrine of the police power (it is confined to the appropriatory aspect of that power), *i. e.*, to such appropriation as is incidental to the destruction of property as a nuisance and has no place in the vastly wider scope of such power that is regulative of energies that are curbed, not that they may be impaired or destroyed, but, on the contrary, that they may be of greater service and beneficence to the public.

Instances of such regulative exercises of the police power are met at every turn and constitute in fact the chief char-

acteristics of modern social life. There are, to use a rough analogy, two aspects of the exercise of the police power, one, so to speak, *in rem*, and the other *in personam*; and it is to the former alone that the proposition of counsel has any possible pertinence, and, even in that connection, it is of doubtful value as a definition, and of no apparent service as a criterion.

The distinction between these two aspects of the police power is perfectly patent. The destruction of a pest house would be an illustration of appropriation of property because it was *per se* a nuisance, *i. e.*, a menace to the public health, while the compulsory vaccination of school children would be in order to prevent them from becoming such. The securing of public safety from anticipated dangers, rather than the abatement of consummated nuisances, is the essence of the police power in its broader scope. That there are such dangers to be anticipated from the operation at a grade crossing of a steam railroad and a trolley line is not more obvious than that each of these public agencies contributes its element to such danger. The steam road may, indeed, furnish in greater degree the active element of danger to human life, but the surface road in its operation brings to such place of danger its human freight in extraordinary numbers and under special conditions, which, or so the legislature might determine, greatly increase and accentuate the normal danger, and hence justify its elimination by the joint act or at the joint expense of both of the public agencies that contribute in its production. It is matter of common knowledge that during what are termed the rush hours of the day a single surface car of modern construction carries a hundred or more passengers, and that the cars thus crowded follow each other in an almost unbroken procession. The stalling of one of these cars upon a grade crossing by the sudden giving out of the electric current, or its propulsion on to the railroad track by the failure of a brake to work properly, or, as in the Newark case (*State v. Young*, 56 Atl. Rep. 471), by the failure to sand the track, would imperil the lives of scores, who were brought into such position of peculiar peril by reason of being passengers on a street railway. It is not at all

a question of the creating of a common nuisance, but solely of the participation in and contribution to a common source of danger arising from the transportation problem in its relation to grade crossings of common carriers of passengers.

The state grants this use of its highways for the convenience of its citizens, and the incorporators of such companies eagerly seek the privileges thus granted because of the profits to be derived therefrom; hence, if dangers arise from the very success of such enterprises, it is eminently within the exercise of the police power of the state in the elimination of such dangers to place a portion of the expense of so doing upon those who profit by the very success which has contributed to such dangers.

The fact that by such a collision as we have suggested the lives of the passengers on the steam railroad are also imperiled, so far from demonstrating that the entire expense of eliminating the dangerous condition should be borne by such railroad, merely emphasizes the participation of each carrier in the production of a common source of danger, and hence points to their joint contribution to the expenses of its elimination.

In support of this obvious conclusion, counsel for the defendant cites a number of pertinent authorities, but the question would seem to be at bottom one of fact, from which, when the fact is once established, the legal result follows as a necessary consequence. The establishment of such fact is, moreover, a part of the legislative function, and as such is not subject to review by the judicial department.

In *Hopper v. Stack*, 69 N. J. L. 562, 567, we said: "Every exercise of the police power involves, of necessity, the determination by the lawmaker of some fact quite apart from the exercise of any legislative discretion concerning it," and illustrations of such determinations of fact were given and the matter discussed at some length.

The proposition thus advanced has been not only adopted by the Court of Errors and Appeals, but has been elevated into a presumption. "Police regulations of this character," said Chancellor Pitney, in *Meehan v. Excise Commissioners*.

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75 N. J. L. 557, 562, "must, in the absence of clear evidence to the contrary, be deemed to be based upon facts within the possession of the legislature rendering such legislation proper, if not necessary. See *Hopper v. Stack*, 40 Vroom 562." And, in *State v. Sutton*, 87 N. J. L. 192, 193, also a Court of Errors and Appeals decision, a condition that would justify the exercise of the police power, was spoken of as "one of those determinations of fact that the legislature has the right to make for itself when prescribing a police regulation," citing *Hopper v. Stack* and *Lyons v. Morris County*, 86 *Id.* 206. It is this prerogative of the legislative department of the government thus to predicate its exercise of the police power of the state upon facts within its own possession and keeping that renders such power so unamenable to precise judicial definition rather than any inherent difficulty in defining the limits of such power when applied to a given state of facts.

The foregoing remarks, coupled with our discussion of the topic and citation of authorities in the case of *Erie Railroad Co. v. Board of Public Utility Commissioners*, decided at this term, lead to the conclusion that the provision of the Fielder act drawn under review was within the proper sphere of legislation, and that the order of the utility board brought up by this *certiorari*, merely carried out the clearly-expressed intent of the legislature. That the state, through its chosen agencies, is not required in such a situation to ascertain the exact quota of contribution to a common danger, and by that standard assign the expense of its elimination, is borne out by the cases cited by counsel for the defendant. Under such circumstances, the province of the judicial office is thus stated by Chief Justice Beasley in *Douglass v. Essex County*, 38 N. J. L. 214: "Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity of the result, is out of place. It is no province of the courts to supervise legislation and keep it within the bounds of propriety and common sense, so that even if in this case it could be demonstrated that the regulation in question was incommodious, or even hurtful, an

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appeal for relief to the judicial power would be utterly in vain." This is stronger language than is called for by the circumstances of the present case, but the rule of law to which it leads up cannot be too strongly stated, or too rigidly observed if the relative spheres of the legislative and judicial departments of the government are to be kept separate in obedience to the constitutional mandate.

The order of the utility board brought up by this writ is affirmed, with costs.

NELSON STARK ET UX. v. MARK M. FAGAN.

Argued February 15, 1916—Decided June 8, 1916.

Section 15 of the act for the settlement and relief of the poor (*Pamph. L. 1911, p. 390*), requiring certain relatives of any indigent person to provide relief for such person, is constitutional.

On *certiorari*.

Before Justices GARRISON, TRENCHARD and BLACK.

For the prosecutor, *Arthur H. Mitchell*.

For the defendant, *Thomas J. Brogan*.

The opinion of the court was delivered by

GARRISON, J. This writ brings up for review an order of the juvenile court of Hudson county directing the prosecutors, the grandparents of Pierce Stark, to pay a weekly sum for his maintenance as an indigent infant.

The proceedings are under the act for the settlement and relief of the poor (Revision of 1911, *Pamph. L. 1911, p. 390*), and it is not contended that this act does not apply.

The contentions are, first, that the provisions of this act were not complied with. We think that they were in all essential respects.

It is further contended that the provision of section 15 of the act, in so far as it affects grandparents, is unconstitutional. We think that this is not so.

The argument that such requirement is not within the police law, or the taxing laws, and that it is an attempt to transmute a purely moral obligation into a legal one are aside from the mark. The statutory requirement rests upon an imperfect legal obligation recognized at common law; such obligations require statutory aid to render them enforceable, but do not derive their obligation from such statutes. The ability of a married woman to recover damages for the alienation of her husband's affections is a modern illustration in point. *Sims v. Sims*, 79 N. J. L. 577.

This natural obligation was recognized and enforced by the statute 43 *Eliz.*, c. 2, by which father and mother, grandfather and grandmother of poor, impotent persons were required to maintain them as the Quarter Sessions should direct.

Blackstone gives the basis on which the liability rested at common law (1 *Bl. Com.* 448), and in 30 *Cyc.* 1122 the subject is discussed and the American cases cited.

In New Jersey, at a very early period, the obligation was a recognized one, for, in *Kiser v. Overseers of the Poor* (1805), 3 N. J. L. 5, an order of the Quarter Sessions on a grandfather to support his three grandchildren was set aside solely on the ground that he had had no notice of the proceeding before the Sessions.

The act is not void for unconstitutionality.

The order brought up by the writ is affirmed.

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RICHARD E. HARRIS, RELATOR, v. SAMUEL J. CORKER.

Submitted March 16, 1916—Decided June 6, 1916.

Chapter 365 of the laws of 1915 (*Pamph. L.*, p. 677) is special legislation regulating the internal affairs of counties and is unconstitutional.

On *quo warranto*.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the relator, *Campbell & De Turck*.

For the defendant, *Clarence Mabie, Waldron M. Ward and John R. Hardin*.

The opinion of the court was delivered by

SWAYZE, J. The relator claims the office of custodian of the Bergen county court house by virtue of an election pursuant to chapter 365 of the laws of 1915. This act applies only to counties having between one hundred and two hundred thousand inhabitants, where a court house has been erected in pursuance of the act of March 19th, 1901, which has not adopted or does not hereafter adopt the Civil Service act of 1908. This is a triple classification. The act does not apply to all counties having between one hundred and two hundred thousand inhabitants; nor to all counties that adopt the act of March 19th, 1901; nor to all counties that fail to adopt the Civil Service act. It seems likely that the three qualifications were united in order that the act might apply to Bergen county alone. Such a classification has already been condemned. *State v. Riordan*, 75 N. J. L. 16.

It is argued by the relator that he may claim a position under the act of 1910. *Comp. Stat.*, p. 521, pl. 167. The answer is: (1) his information claims an office, not a position;

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(2) *quo warranto* is not the proper remedy if in fact it is a mere position. We cannot sustain the plaintiff's claim to something not within the pleadings, nor can we on *quo warranto* adjudicate the claim of the defendant to a mere position. If the relator's claim that the place is a mere position were correct, nothing could be done in this present proceeding. We find there has been no ouster and there must be judgment for the defendant.

WILLIAM C. HENDEE, ADMINISTRATOR, v. WILDWOOD,
DELAWARE BAY AND SHORT LINE RAILROAD
COMPANY.

Argued February 16, 1916—Decided May 13, 1916.

Where plaintiff's general employment was that of running a train and his special employment was as fireman, and there was evidence to show that in emergencies firemen were accustomed to perform the duties of a brakeman, it was too narrow a definition of the word "employment" to hold that a fireman, acting in an emergency in the capacity of brakeman, was a volunteer, since such duties were a part of his general employment of running the train.

On *certiorari* to Cape May Pleas.

Before Justices SWAYZE, PARKER and KALISCH.

For the plaintiff, *William C. French* and *Samuel T. French*.

For the defendant, *J. Fithian Tatem*.

The opinion of the court was delivered by

SWAYZE, J. The facts found by the trial judge are as follows: The petitioner's decedent, Harry C. Hendee, was employed by the Wildwood, Delaware Bay and Short Line

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Railroad Company as a locomotive fireman. He was also employed as an engineer at the company's pumping station, but this additional duty has no connection with the present case. On the day of the accident in question the train from Wildwood, on which Hendee worked, left Wildwood, as the judge found, about eighteen minutes late and arrived at Wildwood late. The crew consisted of engineer, fireman, brakeman and conductor. The conductor at the time of the accident was at the station and the other members of the crew were drilling the train. Two cars were lying on a siding and a third car was being shoved in to couple with these two cars. The brakeman ran ahead to make the coupling between the tank of the engine and the single car and the decedent left his engine and ran to the other end of the car to make the coupling between the single car and the two cars standing on the siding. The engineer was in charge of the train at the time. While making this coupling the decedent received the injury from which he died.

Upon these facts, the judge held that the decedent was a volunteer engaged in doing work outside the scope of his employment. This result was based upon the facts found as above stated, and upon what the judge said was uncontradicted testimony that according to the rules of the company, the duties of a fireman extend no further than his engine, notwithstanding the testimony that on other occasions the decedent had left his engine and performed duties outside of the line of his employment. It is important therefore to examine the rules and testimony as to Hendee's acts upon other occasions and as to the situation at the time of the accident. Rule 99 provides for the protection of a train when stopped or delayed under circumstances in which it may be overtaken by another train. The rule reads in part as follows: "The front of a train must be protected in the same way, when necessary by the front brakeman, or in his absence by the fireman." Under some circumstances, then, it was the duty of the fireman to take the place of the front brakeman. Whether these circumstances were present in this case is not conclusive upon the question involved. At the time of the

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accident only the engineer, fireman and brakeman were present with the train. The services of two brakemen seem to have been either necessary or desirable. There was uncontradicted evidence that on other occasions the decedent had acted as brakeman, and that on this particular occasion the engineer, who was in charge of the train, not only knew that Hendee had gone back to a point where the cars were to be coupled, but that the locomotive was operated by the engineer in response to Hendee's signals. The fireman was acting in an emergency in place of a brakeman.

We cannot review the trial judge's findings of fact, but as there is no distinct finding that the fireman's act was not in the line of his employment in the emergency that occurred, we are not controlled by the holding that the decedent was a mere volunteer. That holding is a mingled conclusion of law and fact, and depends in part upon the definition to be given to the word "employment." We think the judge erred in adopting too narrow a definition. Hendee's special employment was that of fireman, but his general employment was to assist in running the train. We think the uncontradicted evidence requires the conclusion that Hendee's act was one necessary to the running of the train. The trial judge could not then have found for the defendant unless he attributed to the word "employment" the narrow and special meaning. We think this was erroneous. The judgment must be reversed and the record remitted for a new trial.

JOHN H. PERLEE, RESPONDENT, v. ROBERT C. JEFFCOTT,
APPELLANT.

Submitted December 2, 1915—Decided June 6, 1916.

1. When the performance of a contract depends on the continued existence of a given person or thing, a condition is implied that impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

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2. The owner of a farm gave an option to buy for one year. Five hundred dollars was paid the owner in cash and a note was given him payable in a year for the same amount. Prior to the expiration of the year, the barn, which added substantially to the value of the premises, was struck by lightning and destroyed; the prospective vendee reclaimed the cash paid and failed to pay the note. *Held*, that the cash could not be reclaimed and recovery could not be had on the note.

On appeal from the Somerset Circuit.

On August 30th, 1913, Perlee, by writing under his hand and seal in consideration of \$500 cash and a promissory note for \$500 payable September 1st, 1914, gave and granted to Jeffcott an option to purchase a farm.

In case the option was not exercised by Jeffcott, and all its terms complied with, the note was to be paid at maturity. If Jeffcott purchased the premises, the \$1,000 paid, represented by the cash and the note, was to be credited on the purchase price. On August 20th, 1914, the barn, which added substantially to the value of the premises, was struck by lightning, and with other outbuildings was totally destroyed. There is a suggestion in the case that the option was extended for two days, from September 1st, 1914, but no proof that this extension was by mutual agreement, or that it was anything more than the voluntary act of Perlee. On September 2d, Jeffcott demanded the return of the cash and the note. On September 3d, Perlee, by written notice, offered to extend the option to September 10th and to reduce the purchase price by \$2,000 on account of the loss by fire. The defendant had insured the house and premises for \$5,000, about two months after the date of the option. This suit was brought on the note in January, 1915, and Jeffcott counter-claimed the cash he had paid. The trial judge gave judgment for the plaintiff for the amount of the note and also on the counter-claim.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

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For the respondent, *James L. Griggs*.

For the appellant, *Hugh K. Gaston*.

The opinion of the court was delivered by

SWAYZE, J. The only ground upon which the cash paid by Jeffcott may be reclaimed is that there was a total failure of consideration. The consideration in a legal sense was Perlee's promise to keep the offer to sell open for a year. It was the promise, not the performance. The offer itself was a continuing offer, open to Jeffcott's acceptance at any time, and Perlee's promise was partially performed. Jeffcott has had the benefit of the option and Perlee has suffered the detriment of being unable to sell or mortgage or lease his property for nearly the whole year. What has happened has been not a total failure of consideration, but an inability to perform, due not to any fault of either party, but to an act of God. The contract was for the conveyance of a specific thing, the farm and premises upon which Jeffcott resided. Both parties, undoubtedly, contemplated the conveyance of the buildings as an essential part of the premises. The destruction of the barn made this impossible. Such a contract is to be construed as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor. *Taylor v. Caldwell*, 3 B. & S. 826, 834. In that case, Mr. Justice Blackburn said: "The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." *Taylor v. Caldwell* is the leading case. It has been approved by our Court of Errors and Appeals in *Middlesex Water Co. v. Knappman Whiting Co.*, 64 N. J. L. 240 (at p. 252), and was there recognized as an exception to the rule. It has been followed and applied under varying states of fact in several cases growing out of contracts made in view of the proposed coronation of Edward VII., which

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was postponed on account of his illness. *Elliott v. Crutchley* (1903), 2 K. B. 476; *affirmed* (1904), 1 Id. 565; *Herne Bay Steamboat Co. v. Hutton* (1903), 2 Id. 683; *Krell v. Henry* (1903), Id. 740; *Civil Service Co-operative Society v. General Steam Navigation Co.* (1903), Id. 756.

We think, therefore, that the trial judge was right in giving judgment for the plaintiff on Jeffcott's counter-claim to recover the cash paid.

The same reasoning leads us to think he was wrong in giving judgment against the defendant for the amount of the note. This note was not due when the performance of the contract became impossible by reason of the fire. Both parties were excused from further performance. Jeffcott was excused from payment of the note as Perlee was excused from his promise to keep the option open for the whole year. The option provided that the note when paid should be credited on account of the purchase price of the farm. Since the farm could no longer be conveyed in the condition contemplated by the parties, the contract in this respect could not be carried out. There should have been judgment for the defendant in the claim on the note.

The judgment must be reversed, but without costs, and the record remitted for a new trial.

MAX SCHREINER, ADMINISTRATOR, v. OLIVER GRINNELL, JR.

Submitted March 16, 1916—Decided June 6, 1916.

1. Under chapter 156 of the laws of 1915, now no longer a part of the statute (*Pamph. L.* 1916, p. 49), a pedestrian crossing a street at a place other than a cross-walk is barred from maintaining an action against an owner of a vehicle not himself driving, for damages caused by a collision, but is not barred as against a driver of the vehicle whether owner thereof or servant of the owner.
2. A case certified should state a concrete case.

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On case certified from Hudson Circuit.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the plaintiff, *Marshall Van Winkle*.

For the defendant, *Isidor Kalisch*.

The opinion of the court was delivered by

SWAYZE, J. The plaintiff's intestate was killed by reason of contact with the automobile of defendant. She was at the time crossing the street at a place other than a cross-walk. The date is not given but we must infer from the questions certified that it was after July 4th, 1915, when chapter 156 of the laws of that year took effect. It does not appear whether the owner or a servant was driving the automobile. The first question certified is: "Is negligence to be conclusively presumed against one who crosses a street at any place other than a cross-walk?" To this we answer no. The statute says nothing about negligence.

The second question is: "Is one so crossing a street barred, because of so crossing, from maintaining an action for damages?" This question cannot be answered by a simple negative or affirmative. The provision of the statute is: "Any person crossing a street at any place other than the cross-walk shall do so at his own risk. Nothing in this regulation, however, shall relieve the drivers of vehicles from being constantly vigilant, exercising all reasonable care to avoid injuring either persons or property." *Pamph. L.* 1915, p. 297, § 12. If the first sentence stood alone we would necessarily answer in the affirmative to the second question certified. It is a legislative declaration that the pedestrian assumes the risk. The subsequent language points to a distinction to be made as to the liability of *drivers* of vehicles. Effect can be given to both provisions by holding, (1) that as against *owners* of vehicles not themselves driving, the pedestrian who crosses a street at a place other than a cross-walk is barred from

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maintaining an action for damages caused by collision; (2) that as against drivers, whether they are owners of the vehicle or servants of the owner, the pedestrian is not barred of his action. It is quite clear that the statute did not mean to exempt drivers of vehicles from exercising all reasonable care or to relieve them from their legal liability prior to the statute. It may be well to add that the provision now in question no longer forms part of the statute. *Pamph. L.* 1916, p. 49.

The third question is: "What is the legal effect of the words 'at his own risk' as applied to one so crossing a street?" We cannot answer this otherwise than as already indicated. We must not be understood to approve a form of question which asks for an abstract lecture on the meaning of words. A case certified should state a concrete case.

The same objection applies with even greater force to the fourth question: "What is the cross-walk of a street?" The question is irrelevant to the concrete case before us since the accident happened at a place other than a cross-walk.

The fifth question is: "What is the cross-walk of a street where asphalted or macadamized surface streets intersect and no actual cross-walk is found and no cross-walk is in any way marked off?" This question is also irrelevant to the facts of the present case.

FREDERICK A. SCHWARTZ v. AUGUST L. WACHLIN.

Argued July 5, 1916—Decided July 11, 1916.

The Walsh act, as originally passed, required that the votes cast in favor of the adoption of the act equal thirty per cent. of the votes cast for members of the general assembly at the last general election immediately preceding the submission of the act. The amendatory act of 1915 (*Pamph. L.*, p. 12) requires thirty per cent. of the total number of legal ballots cast at the last general election for members of assembly, &c. *Held*, that the number of votes cast in favor of the adoption of the act must equal thirty per cent. of the total number of legal ballots cast in the municipality, regardless of whether or not such votes were

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cast for a member or members of the assembly, the words "for members of assembly" in the amendatory act being merely descriptive of the particular election referred to.

On rule for *mandamus*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the rule, *Frederick K. Hopkins* and *George J. McEwan*.

Opposed, *John J. Fallon*.

The opinion of the court was delivered by

SWAYZE, J. We think the writ must be refused. The Walsh act, as originally passed, required that the votes cast in favor of the adoption of the act equal thirty per cent. of the votes cast for members of the general assembly at the last general election immediately preceding the submission of the act. This was changed in 1915 (*Pamph. L.*, p. 12), and the act now requires thirty per cent. of the total number of legal ballots cast in such city at the last general election for members of assembly immediately preceding the submission of the act. The title of the act of 1915 shows that it was meant to regulate the procedure in towns as well as in cities and other municipalities, and the word "city" is undoubtedly used in a general sense and means municipalities, just as "towns" in the constitution was held to include cities. The provision applies, therefore, to the town of West Hoboken.

The most significant change made by the legislature in 1915 was to require thirty per cent. of the total number of legal ballots cast. This is very different from thirty per cent. of the votes cast for members of the general assembly as required by the act of 1911. Perhaps the change was due to the greater ease and certainty in ascertaining the number of legal ballots cast than was possible with reference to the number of votes cast for members in counties where more than one member could be voted for by each elector. The addition of

the word "total" emphasizes this requirement. The total of legal ballots cast might, and probably would, be greater than the votes cast for members of assembly, since some voters might well fail to vote for the member or members, or some of them.

This construction is sustained by the change in the collocation of the words. Votes cast for members of the general assembly can only refer to votes for such members. Votes cast at the last general election for members of assembly naturally refer to the ballots cast whether for members of assembly or other officers. The words "for members of assembly" are descriptive of the general election. That they are descriptive is shown also by their interpolation between the words "general election" and the words "immediately preceding," which can refer only to the words "general election."

Nor can it be said that the words "for members of assembly" were unnecessary to describe a general election. We have general elections at which members of the assembly are not voted for. Elections to pass on proposed constitutional amendments are general and are not uncommon; and we have now begun to have acts of the legislature submitted to a referendum of the whole state. Such elections may become more frequent. Constitutional elections necessarily occur at a different date from elections for members of assembly; referendum elections for the whole state are general and may occur at different dates. It was, therefore, necessary for the legislature to define what general election it meant.

The rule is discharged, since less than thirty per cent. of the total number of legal ballots cast were in favor of the adoption of the act. No costs will be allowed.

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STATE v. EDWARD DUDLEY.

Argued April 3, 1916—Decided June 6, 1916.

The defendant was charged with counseling and procuring another to disobey a subpoena to testify in a case pending in Chancery; all the defendant's acts were committed outside the county in which the indictment was found; the state sought to hold him as a principal in the misdemeanor because the facts averred as is said showed the commission of a crime within the county by the person subpoenaed. *Held*, that to sustain the indictment there must be found in it a statement of facts which would constitute a misdemeanor by the latter, and that it was not sufficient to aver that he had been duly and legally served with a subpoena, without averring what witness fee, if any, had been paid him and facts showing that the amount was the proper amount; the averment of due and legal service is a mere legal conclusion.

On error to the Hudson Sessions.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the state, *George T. Vickers* (*Robert Hudspeth* and *James W. McCarthy* on the brief).

For the defendant, *Alan H. Strong*.

The opinion of the court was delivered by

SWAYZE, J. The indictment charges that the defendant counseled and procured Schaeffer to disobey a subpoena to testify before a Vice Chancellor. The proof at the trial showed that all Dudley's acts were committed outside of Hudson county. There was therefore a clear failure to prove that the crime of counseling and procuring the commission of a misdemeanor took place within the jurisdiction of the court. The state recognizes this difficulty and strives to sustain the indictment upon the theory that the facts set forth

show that Dudley participated in Schaeffer's alleged offence, and that since it was a misdemeanor only, Dudley's participation made him a principal and liable to indictment in Hudson county, although he committed no act therein. The indictment does not in so many words charge participation by Dudley as a definite crime, other than that of counseling and procuring Schaeffer. If it is to be sustained at all, it must be because the facts averred show the commission of the crime, and make unnecessary the express averment of the particular crime. To sustain the indictment on this ground, we must find in it a statement of facts which would constitute a crime by Schaeffer; for if he is not shown to have committed the crime in Hudson county, Dudley cannot be held to have committed one there. We need notice but one of the many defects mentioned in the defendant's brief. It is not averred that a witness fee was paid to Schaeffer. That is necessary to compel the attendance of a witness in a civil suit. The indictment avers only that Schaeffer had been "duly and legally served" with the subpoena. To constitute due and legal service, different sums are required by law to be paid; sometimes fifty cents, if the witness resides in the county, sometimes more if he be a non-resident. What sum, if any, was paid Schaeffer? Was he a resident of Hudson county or a non-resident? Was he a resident of New Jersey or some other state? If the latter, how and where was service made? Was it in Hudson county or in the state of Schaeffer's residence? We cannot tell from the indictment whether the facts were such that the service was due and legal. We have the opinion of the grand jury that it was, but that is a mere legal conclusion. "Good pleading," said Chief Justice Beasley, "requires that such facts shall be stated, so that the court may be enabled to see that if their truth be admitted, the defendant is conclusively guilty of the crime charged." We have nothing to add by way of reasoning to what he says with his usual clearness and force in the opinion from which we quote *State v. Maires*, 33 N. J. L. 142, 145. It may be well to point out that the question in this particular case is impor-

tant because the facts as proved raise the very interesting question whether a resident of another state temporarily present in or passing through New Jersey can be served with a subpoena and paid a witness fee of fifty cents, and be thereby compelled to leave his own affairs, perhaps in a distant state, to attend court here? The question is novel in our state and would require most careful consideration before we would venture to pronounce an opinion. Yet if we should eventually hold such a service good, we should not think that one who in another state had advised the witness that he was not bound to attend had necessarily been guilty of a crime in New Jersey. Surely a resident of another state who is served with a subpoena while temporarily in New Jersey and paid a witness fee of fifty cents only, as if he were a resident of the county in which he is subpoenaed to appear, may consult counsel as to his obligation to attend, and counsel would not be a criminal if he erred in his advice on a question of novelty and nicety. On the other hand, if the witness was a resident of the county where he was to attend and was paid the regular fee, it would be impossible to avoid the conclusion that counsel who advised him to disobey was interfering with the administration of justice and committing a contempt of court. The difference between the two cases is enough to show the necessity of stating the facts instead of the mere legal conclusion that service was due and legal, certainly in a case where the crime is not charged in so many words but is to be inferred from the facts set forth in the indictment.

Since the proof showed that the crime of counseling and procuring was not committed in Hudson county and the indictment fails to charge any other crime, the defendant was entitled to a verdict that he was not guilty as charged. The judgment must be reversed and the record remitted for a new trial.

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State v. Foster.

STATE v. HENRY W. FOSTER.

Submitted March 16, 1916—Decided June 6, 1916.

1. An indictment charged a director of a trust company with over-drawing his account in violation of the Crimes act. *Comp. Stat.*, p. 1796, § 171. The overdraft was charged to have taken place on August 9th, 1913. The defendant had left with the secretary of the trust company three notes of a third party for sale to country banks. The secretary had credited the defendant's account on July 17th, 1913, with the proceeds of one of the notes. *Held*, that it was error to allow the secretary to testify that the note was not submitted to the board of directors before it was purchased, since the indictment did not charge a violation of section 15 of the Trust Companies act. *Comp. Stat.*, p. 5661.
2. When a witness denies any recollection of a relevant conversation, it is proper on cross-examination to ask him what he said at a later time, either by way of stimulating his memory or of discrediting him.

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On error to the Essex Oyer and Terminer.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the state, *Frederick F. Guild* and *Wilbur A. Mott*.

For the plaintiff in error, *Jerome T. Congleton*.

The opinion of the court was delivered by

SWAYZE, J. The defendant was indicted under section 171 of the Crimes act (*Comp. Stat.*, p. 1796) for overdrawing his account in the Roseville Trust Company. His defence was that he had left with Smith, the secretary and treasurer of the trust company, to be sold to country banks three notes of the Alpha Alcohol Utensil Company; that he understood from Smith that the notes had been sold and that he was entitled to credit for the proceeds. If such had been the fact, the defendant would have had a considerable balance to his credit. In truth, Smith had caused credit to be given the defendant

for the proceeds of one of the notes in a form that indicated on the books that it had been discounted by the trust company, and had directed the bookkeeper to leave a line in the ledger for another credit. The second credit was not in fact made. After the failure of the bank, Smith handed back to the defendant two of the three notes. The note which had been discounted was paid, apparently by the maker, and the defendant made good his overdraft.

We think there are two errors that require a reversal of the conviction. Smith testified that the note for which Foster received credit was purchased by the trust company at a time when Foster was a director. He was then asked: "Was that note submitted to the board of directors before it was purchased?" This was objected to on the ground that Foster was not on trial for any such offence. The reference was obviously to the crime defined in section 15 of the Trust Companies act. *Comp. Stat.*, p. 5661. The state undertook to justify the question on the ground that the evidence would tend to show the defendant's knowledge of the state of his account. The argument was that if Foster was in such a financial condition that he found it necessary to do an illegal act in order to get credit, he must have known that his account was overdrawn. The note was credited to the account July 17th. The indictment does not charge any then existing overdraft. The two overdrafts charged in the indictment are both averred to have been made on August 9th; in fact, the check which constituted the overdraft was charged to the account on that day; the only difference between the two counts is that one charges the overdraft to have been the amount of the check; the other charges it to have been the total overdraft at the close of business on August 9th, the difference consisting of charges on August 4th and August 8th. If we assume in favor of the state that the credit of the note on July 17th was illegal under the Trust Company act, that accomplished illegality does not tend to prove an overdraft in August. On the contrary, the very fact, if it were a fact, that it was an accomplished illegality, would demonstrate that there was no overdraft for two weeks thereafter. Foster

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would properly think that he might draw on the proceeds of the note. Whatever might be said of the alleged illegal discount as tending to prove a then existing overdraft, it had no tendency to prove future overdrafts, and none other are charged in the indictment. To infer an overdraft in August from evidence from which an overdraft in July might possibly be inferred would not be permissible. We have assumed in favor of the state that the transaction of July 17th was illegal as to Foster. The evidence does not warrant any such conclusion. Both Smith and Foster, who alone knew the facts, testified that the notes were turned over to be discounted at some other institution. If Foster ever knew that the note had been purchased by the Roseville Trust Company, it was not until August 1st. Section 15 of the Trust Companies act requires that the act shall be done knowingly to constitute the crime. Smith, of course, had knowledge, but, in the absence of proof of knowledge by Foster of what Smith had done, Foster was guilty of nothing illegal. Under these circumstances, the evidence allowed over objection that the note was not submitted to the board of directors was most prejudicial to the defendant. The court admitted it on the theory that Foster's knowledge of the alleged illegality tended to prove that he knew his account was overdrawn, and the jury could not have avoided the inference that Foster was so desperate that in order to escape the consequence of overdrawing, he would participate in a criminal discount by the trust company. How prejudicial the evidence was is shown by the charge of the judge. He referred at some length to the fifteenth section of the Trust Companies act, and said that the office of director was not one thrust upon the incumbent but was assumed and held voluntarily by him; "he must, therefore, be expected to assume, with the office, the full measure of responsibility incidental to it." This portion of the charge was not germane to the case unless the judge meant to give the jury the impression that the defendant might be convicted for a violation of the Trust Companies act. It was error because no such violation was charged in the indictment.

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There is another error. Smith, when recalled by the state, testified, in answer to questions by the court, that only one of the notes appeared in the account; that he did not see the other two until handed back to Foster after the bank closed. Thereupon the counsel for defendant on cross-examination asked Smith if he did not after the bank closed return the two notes to Foster and express sorrow that he had involved the latter; that he had not had the notes discounted (taking them out of his wallet and handing them to Foster). This was excluded because the court said the conversation between Foster and the witness could not bind the state. That, however, was not the question. The state had been allowed to put in Smith's evidence tending, as it thought, to show guilty knowledge on the part of Foster. It was vital to the defendant to show that he had no such knowledge, and any testimony that would show that he was relying on Smith's statement on July 17th that Smith had disposed of the note and that it was all right to draw on the account was competent. When Smith denied any recollection of the conversation, it was proper, by way of stimulating his memory or discrediting him, to show what he said at a later time.

For these errors the judgment must be reversed and the record remitted for a new trial.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
LEHIGH VALLEY RAILROAD COMPANY, PLAINTIFF
IN ERROR.

Argued February 15, 1916—Decided June 6, 1916.

1. Although the Morris Canal and Banking Company is not discharged by its lease to the Lehigh Valley Railroad Company from the obligation to maintain bridges over the canal, imposed by its charter, the lessee took a lease in perpetuity which is equivalent to a title so far as concerns this obligation, and thereby assumed the public burden of maintaining bridges.

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2. The obligation under the charter of the Morris Canal and Banking Company to maintain bridges over the canal is not limited by the necessities of such traffic as existed at the date of its charter, but extends to a case where traffic is increased over a pre-existing highway.
3. The operation of motor vehicles and the improvement of a highway by macadamizing does not affect the charter obligation to maintain bridges over the Morris canal.

On error to the Morris Sessions.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the state, *Charlton A. Reed*.

For the defendant, *Charles B. Bradley (Collins & Corbin on the brief)*.

The opinion of the court was delivered by

SWAYZE, J. The defendant is charged with maintaining an improper bridge over the Morris canal so as to obstruct and narrow a highway. While the indictment does not in so many words charge a violation of the defendant's statutory duty, which measures the defendant's obligation (*State v. Lackawanna Railroad Co.*, 84 N. J. L. 289), it nevertheless avers facts which amount to a violation of the statutory duty, and is sufficient. *State v. Lackawanna Railroad Co.*, 86 Id. 62. The averments of the indictment may have been thought important because the statutory duty is imposed by the charter of the Morris Canal and Banking Company, while the defendant is only lessee of the property of that company. In our opinion this makes no difference in the obligation of the lessee. *New York and Greenwood Lake Railroad Co. v. State*, 50 Id. 303; *Meyer v. Harris*, 61 Id. 83. Although the Morris Canal and Banking Company is not discharged by the lease from the obligation imposed by the charter (*Ryerson v. Morris Canal and Banking Co.*, 71 Id. 381), the lessee took a lease in perpetuity which is equivalent to a title so

far as concerns this obligation, and thereby assumed the public burden of maintaining bridges. If that were not the legal situation the evidence shows that the defendant in fact rebuilt the bridge. If unauthorized by statute and so built as to obstruct the highway, the bridge would be a public nuisance for which the defendant would be criminally responsible. As against this objection, the indictment and conviction must be sustained.

A greater difficulty arises out of the contention of the defendant that the duty is limited and defined by conditions as they existed at the time the charter was granted. There is undoubtedly a difference between the obligation imposed by the charter of the canal company as construed in *Morris Canal and Banking Co. v. State*, 24 N. J. L. 62, and the obligation of a railroad company as generally understood since the decision of *Central Railroad Co. v. State*, 32 Id. 220, and expressed by Mr. Justice Dixon in his concurring opinion in *Morris and Essex Railroad Co. v. Orange*, 63 Id. 252, 273. Under Chief Justice Green's decision the canal company was not compelled by their charter to maintain bridges over the canal where it was crossed by a highway laid out subsequent to the construction of the canal. The facts of the present case are perhaps not entirely clear in this respect. There seems to be no doubt that the obstruction is due to the fact that a new road has been laid out and macadamized which has greatly increased the travel over the bridge. This new road seems to begin near the end of the bridge, but it is said in the brief for the plaintiff in error that the inconvenience complained of arose from the use of the southern end of the old road in conjunction with the entirely new road on the north side of the bridge. This seems to mean, as was probably the case, that the new road connected with the old road at the bridge. If this is so, we have the case of traffic increased by the new road but passing over the old road at the entrance upon the bridge. This is only the ordinary case where traffic is increased by the development of the country or the growth of a town. To such a case the rule of *Morris Canal and Banking Co. v. State* is not applicable. Indeed, the stress

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of the argument was rested on other grounds. It is urged that the operation of motor vehicles and the improvement of the highway by macadamizing has so changed the nature and use of the highway that the obligation of the canal company no longer exists. This very broad contention is elsewhere qualified by the statement that the company's obligation to maintain the bridge has terminated at least with regard to traffic by motor vehicles. Stated more moderately, the contention is that the duty of the defendant is limited and defined by conditions as they existed at the time the charter was granted in 1824. We find nothing in *Morris Canal Co. v. State* to justify this argument. That case turned upon the peculiar language of the charter in blending in the same provision roads and farms and it was said that it never could have been the design of the legislature to require that in all future time, whenever a landholder should choose to unite two tracts of land, lying on opposite sides of the canal, into one farm the company should build and maintain a bridge for his accommodation. To avoid this absurd result, the court was obliged to hold that the obligation did not apply to a highway laid out subsequently to the construction of the canal. As to highways previously laid out, the obligation was to make good and sufficient bridges and to keep the same in repair, so as to prevent any inconvenience in the usage of the road by reason of the canal crossing it. "Usage of the road" necessarily means any legal usage and as the duty was imposed, as Chief Justice Green recognized, in terms of the future, it must mean any usage of the road that shall become lawful. The charter looks to the legality of the usage, not to the amount or density of the traffic. It cannot be that because our roads are made better by macadamizing on either side of a canal bridge, that the public are to lose the substantial benefit intended by the legislature authorizing the expenditure of public money, by reason of a bridge adapted only to the state of traffic nearly a century ago. The rule of *Central Railroad Company v. State* applies. The company is subject to a continuing duty measured by circumstances. A bridge, as Chief Justice Beasley said, at one time adequate,

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might from an increase of business or population become totally inadequate, and a provision which at one juncture would be a discharge of the duty, would at another, amount to its infraction. It is true that what the statute protects is the usage of the road so that it may not become inconvenient. It may be that uses may be found for our highways so onerous that they will cease to be roads in any proper sense. This result in our judgment is not produced by their use for motor vehicles, a use recognized by legislation as a proper use not only for urban streets but for country roads. If the operation of electric cars with poles and wires in a public street is within the ordinary public easement (*Halsey v. Rapid Transit Street Railway Co.*, 47 N. J. Eq. 380; *Montclair Military Academy v. New Jersey Street Railway Co.*, 70 N. J. L. 229), surely the operation of motor vehicles is.

We find no error and the judgment is affirmed.

STATE v. GEORGE SMITH.

Submitted March 16, 1916—Decided June 6, 1916.

1. The name of a person necessary for the description of a crime, if known, must be stated in the indictment.
2. Where the indictment contains an averment of an illegal sale of liquors to persons unknown to the grand jury, it is improper on the trial to admit evidence as to sales made to them of persons who were subpoenaed to testify or testified before the grand jury, but are not named in the indictment.
3. Where an indictment charges illegal sale of liquors to a person named and to others not named, and evidence as to sales to the latter is improperly admitted, the judgment must be reversed and the record remitted for a new trial. The defendant is not entitled to be discharged.

On error to the Cumberland Sessions.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

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For the state, *Edwin F. Miller*.

For the plaintiff in error, *Rex A. Donnelly*.

The opinion of the court was delivered by

SWAYZE, J. The defendant was convicted on the fourth count in the indictment and acquitted on the others. The fourth count charges illegal sales of liquor to Campbell Clinger and to divers other persons whose names are to the grand jury inquest unknown. At the trial several witnesses were called to the reception of whose testimony the defendant objected on the ground that they had been subpoenaed to testify before the grand jury in this case; one had, in fact, testified. The court overruled the objections. At the very close of the case the prosecutor moved to strike out the testimony of the witness who had testified before the grand jury, and this was done. The question presented is whether the charge in an indictment of a sale to a person unknown is sustained by proof of a sale to a person who was known. To state this question is to answer it. It has never been doubted that if the name of a person, which was necessary for a description of the crime was known, it should be stated in the indictment. The doubt has been whether an indictment was good if it failed to state the name, and it was settled in early days that in order to prevent a failure of justice the indictment might aver that the name was unknown, if that was the fact. 1 *Chit. Crim. L.* *213. The reason has been stated more than once by this court. *Flanagan v. Plainfield*, 44 N. J. L. 118; *Feigen v. McGuire*, 64 *Id.* 152; *State v. Delancey*, 76 *Id.* 462. The defendant is entitled to know the precise charge made against him so that he may prepare his defence. When the name is given, the person named may be called to disprove the charge, or the defendant may prepare to prove that he is not of good repute for veracity or has made conflicting statements, or was elsewhere at the time the offence is charged to have been committed. Where the name of the witness is withheld, the defendant cannot so well prepare his defence, or, perhaps, cannot prepare it at all. His situation is still

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worse when the indictment falsely avers that the names are unknown, for he may thereby be misled into the belief that the state does not mean to rely upon transactions with or concerning persons whose names were known. A false averment in an indictment that names where unknown savors of trickery and is most reprehensible. A bill presented by a grand jury as a true bill should not contain averments that are known to be false. It was, in effect, conceded that the evidence of the witness who had testified before the grand jury was improperly admitted. We think the harm was not undone by merely striking out his evidence at the very end of the case. The evidence of the witnesses who were subpoenaed, but did not testify before the grand jury, was equally objectionable. If these witnesses were subpoenaed by order of the grand jury itself, their names must have been known. If they were subpoenaed by the prosecutor, their names could have been easily ascertained. The grand jury could not shut its eyes to the presence of witnesses in its anteroom, and it is inconceivable that they had evidence of sales to these men without knowing their names. To justify an averment that third persons are unknown, the case must be one in which they cannot be ascertained (1 *Chit. Crim. L.* 212), not one where the grand jury willfully closed its eyes.

This error, however, does not result in a discharge of the defendant on this indictment, as in the case of larceny put by Chitty (1 *Chit. Crim. L.* *213), or in an acquittal, as in the case of an indictment against an accessory. In the former case, where the property was laid to be in one falsely said to be unknown, a different crime was charged, and a failure to prove property in one unknown to the grand jury was an entire failure to prove the state's case. In the latter case, where the principal was falsely said to be unknown, there was necessarily a failure to prove the principal offence as charged, and this involved a failure to prove the crime of accessory to that offence. The present case is different. The charge is an illegal sale to Clinger and others unknown. There was evidence from which the jury might have found an illegal sale to Clinger. This would have warranted a verdict of guilty,

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although all evidence of sales to others may have been rejected. We cannot say whether the jury convicted on account of the sale to Clinger alone, or even whether they believed the testimony as to that sale. Probably, they were influenced by the whole of the testimony, including that of sales to persons falsely averred to be unknown.

The judgment must therefore be reversed and the record remitted for a new trial.

JAMES E. CROSSLEY, PLAINTIFF AND APPELLEE, v.
WILLIAM H. CONNOLLY COMPANY, A CORPORATION,
DEFENDANT AND APPELLANT.

Submitted March 16, 1916—Decided June 28, 1916.

1. On appeal from the District Court, the Supreme Court will not reverse a judgment because of the action of the trial judge in dismissing the jury and granting a continuance after the commencement of the trial, unless such action is plainly erroneous and is a clear abuse of the trial court's discretion.
2. When a jury in the District Court, summoned on the demand of the defendant, has for good cause been discharged by the court and the trial continued for one week, the defendant is not entitled to a jury at the trial on the adjourned day unless he pays or tenders the cost of a new venire.

On appeal from the District Court of the city of East Orange.

Before Justices GARRISON, TRENCHARD and BLACK.

For the appellant, *Newton P. Kinsey*.

For the appellee, *Gaetano M. Belfatto*.

The opinion of the court was delivered by

TRENCHARD, J. This is the defendant's appeal from a judgment in favor of the plaintiff rendered by the judge of the District Court sitting without a jury, in an action to recover upon a contract between the parties.

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The first reason assigned for reversal is that the judge erred in dismissing the jury and granting a continuance of the case after the commencement of the trial.

We think the contention is without merit. The action was taken when it was discovered that the president of the defendant company, a witness essential to the plaintiff's case, was absent when called, although he was present when the case was moved. The rule is well settled that we will not reverse a judgment because of the action of the trial judge in dismissing the jury and granting a continuance after the commencement of the trial, unless such action is plainly erroneous and is a clear abuse of the trial court's discretion. *Haines v. Roebuck*, 47 N. J. L. 227; *McCourry v. Doremus*, 10 *Id.* 245. See also cases collected in note in 4 C. J. 809. Tested by that rule the action of the trial judge was unobjectionable.

The only other reason for reversal argued is that upon the day to which the trial had been continued, it proceeded without a jury against the objection of the defendant.

We think there is no merit in this contention.

True, the defendant had demanded a jury at least one day before the return day of the summons pursuant to the requirement of section 4 of *Pamph. L.* 1905, p. 494; *Comp. Stat.*, p. 1991, ¶ 117d (*Home Coupon Exchange Co. v. Goldfarb*, 78 N. J. L. 146; *Phoenix Pottery Co. v. Perkins Co.*, 79 *Id.* 78; *Haythorn v. Van Keuren*, 79 *Id.* 101; *Kearns v. Simpson*, 83 *Id.* 221; *Walnut v. Newton*, 82 *Id.* 290); and had paid the cost of the venire as required by *Pamph. L.* 1903, p. 505 (*Comp. Stat.*, p. 1999, ¶ 149); and a jury had been summoned accordingly. But the jury thus summoned had, for good cause, been discharged and the trial continued by the judge for one week. In this situation in order for the defendant to obtain a jury for the trial upon the day to which the cause had been continued it was necessary to pay or tender the cost of the venire. Since this was not done the defendant cannot be heard to complain that the trial proceeded without a jury.

The judgment below will be affirmed, with costs.

ERIE RAILROAD COMPANY, PROSECUTOR, v. BOARD OF
PUBLIC UTILITY COMMISSIONERS AND CITY OF
PATERSON.

Argued December 22, 23 and 24, 1915—Decided June 23, 1916.

1. The act of 1913 (*Pamph. L.*, p. 91), known as the Fielder Grade Crossing act, is not confined in its operation to a single crossing, but in a proper case may include one or more crossings in the same petition.
2. The Supreme Court, upon *certiorari*, or under section 38 of the act of 1911 (*Pamph. L.*, p. 374), can review the action of the board of public utility commissioners in ordering an alteration of the grade of a highway with a steam railroad, for the purpose of ascertaining whether or not such order is purely arbitrary; whether or not it has a reasonable basis to rest upon; whether or not it is supported to any extent by the facts submitted to the board for its consideration.
3. The evidence in the record is sufficient to support the findings of the board that such crossings are dangerous to public safety or the public travel is impeded, being the jurisdictional facts.
4. *Quære*. Upon the review of such an order, can additional testimony be taken under the provisions of the *Certiorari* act?
5. The word "impede" in this statute means to place obstructions in the way of; obstruct; hinder; as, to impede progress. It is synonymous with check, hinder, delay.
6. The Erie Railroad Company, as the lessee of the Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company, is "the company operating such railroad" within the meaning of the statute. The order of the board of public utility commissioners was properly directed against the prosecutor, the Erie Railroad Company. The dangerous conditions, to the elimination of which the act is directed, are the result of the operation of the railroad by the Erie Railroad Company.
7. The statute provides the board of public utility commissioners "may" order the company operating such railroad, &c., to alter the crossing. As to the prosecutor, the statute is mandatory. The prosecutor is not concerned with what might happen to someone else. When, in a statute, the word "may" means must or shall.
8. Where the work is in itself a reasonable, proper and fair exaction, when considered with reference to the object to be obtained, the expense is not a reason against its legality, when the order for such work is based upon and made in an exercise of the police power, which is a part of the reserved power of the state.

9. The Fielder act (*Pamph. L. 1913, p. 91, ch. 57*) authorizes the public utility board, in a proper case, to order a railroad company to alter grade crossings according to plans to be approved by the board, by substituting therefor crossings not at grade, either by carrying the highway under or over the railroad, or by reconstructing the railroad under or over the highway, or by vacating, relocating or changing the lines, width, direction or location of the highway and the opening of a new highway in the place of the one vacated, and this includes the power to order such changes in the property and facilities of the railroad company as are fairly incidental to, or rendered necessary by, the alteration of the crossings.
10. An order of the public utility board made pursuant to the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), which is confined in its direction to the railroad company to the alteration of the crossings by changing the highways and by reconstructing the railroad, and by performing such work as is required thereby, does not require the company to make changes in private sidings and the like, not its property, and not within the limits of the right of way.
11. Where an order of the public utility board for the elimination of grade crossings under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*) is confined in its direction to the railroad company to the alteration of the crossings by changing the highways and by reconstructing the railroad and by performing such work as is required thereby, a change in the location of a station building not fairly incidental to, nor rendered necessary by, the changing of the highways or the reconstruction of the railroad, is not required by such order.
12. An order of the public utility board for the elimination of grade crossings under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), which is confined in its directions to the railroad company to the alteration of the crossings by changing the highways and by reconstructing the railroad and by performing such work as is required thereby, does not require the construction by the railroad company of structures upon its lands for the use of private parties in substitution for structures now occupied by them as lessees, and which will be rendered useless by the elimination work.
13. Where the order of the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*) for the elimination of grade crossings directs the street railway company to pay ten per centum of the expense of the changes required by the order directly chargeable to the crossings used by it, that being the maximum amount allowed by the statute, the steam railroad company cannot complain that the street railway company was not ordered to pay more.
14. An order made by the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), requiring the railroad company to make changes in the existing and remaining streets in respect to grade, width and structure, and to make other changes by the

abolition of existing crossings and the substitution of other crossings therefor on new highways, is not invalid by reason of such requirements, it appearing that such changes are all fairly incidental to, and were rendered necessary by, the separation of grades, having reference to the interests of the railroad company as well as those of all the people who have occasion to cross the railroad.

15. Section 13 of the General Railroad act, as amended by *Pamph. L. 1914, p. 490*, confers upon a railroad company power to take by condemnation any land or property required for the purpose of complying with an order made by the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), and the owners of property to be taken have no right to be made parties to, or to demand a hearing in, the proceedings under the Fielder act.
16. The provisions of the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*) are applicable alike to highways existing at the time of the construction of the railroad and to highways subsequently laid out.
17. An order made by the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), requiring the railroad company to make changes in the highways outside of its right of way at its own expense, is valid in respect to such requirement, it appearing that such changes are fairly incidental to the changes ordered in the crossings at the railroad.
18. The Supreme Court, upon review by *certiorari* of an order of the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), will not disturb the action of the board in adopting plans of its own rather than those suggested by the railroad company, unless such action was unreasonable, or based upon some illegal principle, or lacks evidential support.
19. The fact that an order made by the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*) makes no provision for such modification of the details of the plans as may become necessary during the progress of the work, is no reason for setting aside the order. There is a reasonable presumption in favor of the plans adopted, and the board may at any time, for good reasons, properly modify its order.
20. Statutory requirements enacted by the legislature for public safety under the police power of the state are not a taking of private property for public use without just compensation, although conformity to such requirements involves expense.
21. Railroad corporations may in the exercise of the police power by the legislature be required at their own expense not only to abolish grade crossings that existed when the railroad was constructed, but also to carry their tracks over highways laid out since the construction of the railroad or to carry such highways over their tracks; and the expense of such permanent improvement of the railroad property may be imposed by the legislature upon the railroad corporation operating such railroad without violating any constitutional provision.

22. A statutory requirement for the abolition of grade crossings is neither unconstitutional or unreasonable because it does not affirmatively authorize the railroad company to lessen or eliminate the danger at such crossing by decreasing the number of its train movements.
23. The object of a law must, by force of the constitution, be single and be expressed in its title; but the methods of attaining such object and the matters relating thereto, which may be as various as such object requires, need be expressed in the terms of the enactment only.
24. Any contract that a railroad corporation is empowered by the state to enter into is made subject to the future exercise by the state of its police power; and hence the obligations of such contracts are not in a constitutional sense impaired by such future legislation.
25. A state statute requiring the elimination of dangerous grade crossings is an exercise of the police power that is within the scope of the local law, and is not an interference with interstate commerce in the present state of federal legislation upon that subject.
26. The supplement to "An act concerning public utilities," approved March 12th, 1913 (Fielder act), is not an invasion of the exclusive jurisdiction of the Court of Chancery to regulate conflicting public easements.
27. The Fielder act does not impair the *mandamus* power of the Supreme Court.

On *certiorari*, &c.

There are two writs of *certiorari* in this case. The first was allowed on June 16th, 1915, for the purpose of reviewing an order of the board of public utility commissioners, dated April 20th, 1915. The second writ was allowed on July 22d, 1915, for the purpose of reviewing an order of the said board, dated July 9th, 1915, denying the petition for a rehearing of the previous order. The order under review was made, by virtue of the alleged power and authority vested in the said board by the statute (*Pamph. L. 1913, p. 91*), known as the Fielder Grade Crossing act, which is a supplement to the act creating a board of public utility commissioners and prescribing its duties and powers. The records of both writs, with the writs allowed seven other prosecutors, for convenience, have been included in the record of the proceedings under the first writ allowed. The prosecutor, the Erie Railroad Company, is ordered to alter fifteen grade crossings, in the city of Paterson,

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by changing the grade of the streets and reconstructing the steam railroad according to the plan and profile annexed thereto; by substituting therefor crossings not at the grade of the public highways known as Madison avenue, Straight street, Clay street, Market street, Ellison street, Van Houten street, Broadway, Fair street, Hamilton avenue, Lafayette street, Franklin street, Keen street, Warren street, Putnam street and River street. The order further directs any telegraph, telephone company, &c., whose property or construction it may be necessary to change or remove, in order to carry said plan and order into effect, to change or remove the same, according to said plan. The Erie Railroad Company, the city of Paterson and all other parties are ordered to proceed with due diligence to the execution of the order and comply with all the requirements thereof. It was ordered that the work shall be begun on or before August 1st, 1916, and be completed within eight years, from April 20th, 1915; that it be prosecuted in accordance with a single plan, but in four separate divisions, marked A, B, C and D. Section A provides for the elimination of the crossings at Market street, Ellison street, Van Houten street, Broadway, Fair street, Hamilton avenue, Lafayette street and Franklin street. Section B provides for the elimination of the crossings at Keen street, Warren street and River street. Section C provides for the elimination of the crossings at Straight street and Clay street. Section D provides for the elimination of the crossing at Madison avenue, according to a plan submitted by the Erie Railroad Company, known as *Exhibit R 105*, at an estimated cost of \$192,133.92 less than the plan prepared by the city and which carries Madison avenue over the tracks of the railroad. River street and Madison avenue are at the two extreme points. Measured along the railroad, the distance is about ten thousand eight hundred feet, or, substantially, two miles. Market street, in section A, is practically in the centre of the city of Paterson, and is the most traveled of all the streets mentioned in the order. From Market street to Madison avenue, at the southerly end of the work, is about six thousand feet, and to River street, at the other, or northern

end, it is about four thousand eight hundred feet. From Market to Clay and Straight streets, in section C, it is about three thousand feet. From Market street to Ellison street, in the same section, it is six hundred feet, to Van Houten street, three hundred and fifty feet farther on, to Broadway, three hundred feet more, Fair street, two hundred and fifty feet, and Hamilton avenue, two hundred and fifty feet, all in the same section, and from Market street to Keen street, in section B, about four thousand feet, and to River street about four thousand eight hundred feet, the most northerly end of the work, thus considering all the crossings mentioned in the petition in one comprehensive plan or scheme.

The order states the time in which each section is to be completed, commencing with section A, in which Market street is included. The Public Service Railway Company, operating trolley lines over three of the crossings, viz., Park avenue and Market street, one crossing, Broadway and River street, is charged with ten per centum of the cost of the alterations, including damages to adjacent property, directly chargeable to the alteration of those crossings used by the trolley company.

The statute provides the board *may* order the company operating the railroad to alter the crossing, and the entire expense of such alterations, including damage to adjacent property, shall be paid by such railroad, unless a street railway uses such crossing, in which event, an amount of such cost, not exceeding ten per centum of such expense directly chargeable to the crossing used by the street railway company, is to be paid by such company. The estimated cost of the alteration of the crossings is \$2,948,218, for what is called plan No. 2, the one adopted by the board. This does not include damage to adjacent property. The amount of such damage, due to changing grades of streets, estimated at \$168,500; the amount due to revision of buildings and sidings off the railroad right of way, estimated at \$131,922.

The jurisdiction of the board is derived from the provision of the statute, which provides that "whenever a public highway and a railroad cross each other at the same level and it

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shall appear to the board that such crossing is dangerous to public safety or that public travel on such highway is impeded thereby, the board of public utility commissioners may order the company operating such railroad" to alter such crossing according to plans to be approved by said board. The order was based upon proceedings initiated by the board of finance of the city of Paterson, being the board directed in the statute to file a petition, in writing, for that purpose, in which the facts are stated, upon which the relief under the act is sought. In the petition, it is recited that the Erie Railroad Company operates said railroad by virtue of a lease from two separate railroad companies, viz., the Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company. Certain facts relating to each of the fifteen crossings are alleged, and prays, that the said railroad should be elevated to pass over said highways. A time and place were fixed for hearings, notice of which was given to the corporations therein named. Answers were filed. Testimony was taken before the board, commencing on the 17th day of October, 1912, and lasting until February 5th, 1915—eighteen hearings in all.

From the testimony it appeared that some of the streets mentioned in the petition were laid out after the railroad was built. The charters of the lessor companies (*Pamph. L. 1831, p. 24, § 9; Pamph. L. 1841, p. 97, § 11*) provide and impose a duty upon the said railroads to construct and keep in repair good and sufficient bridges or passages over and under said railroads or roads, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle on said road shall not be "prevented" thereby.

The findings of the board were made in a report dated January 11th, 1915, which recites the facts on which the order was made, dated April 20th, 1915. The board found and determined the crossing of each of the streets involved in the proceeding to be dangerous to public safety and that public travel on such highways is impeded thereby. The board also found that the consideration of the entire subject is simplified by the acquiescence of all parties to the proceed-

ing, and that all the crossings mentioned in the petition must be considered in any plan of elimination. It was not questioned but that a general plan for the separation of grades at the crossings was practicable. There was a difference of opinion between the engineers as to details, but the chief objection raised was to the expense.

Then, on February 5th, 1915, a petition for a further hearing was filed by the Erie Railroad Company, and on April 20th, 1915, the same date as the order, a report by the board was made denying a further hearing, in which it is stated, as to the reduction of train movements, that the company was afforded every opportunity to furnish such proof, if it had any, and did not avail itself of such opportunity; in addition, the offer on this score was so indefinite that it did not appear reasonable to delay the proceedings for that purpose. Then writs of *certiorari* were obtained by the Erie Railroad Company, Public Service Railway Company, Passaic Water Company, Western Union Telegraph Company, D. Fullerton & Company, Meyer & De Vogel, Fuller's Express Company and Morris & Company.

On June 15th, 1915, a petition for a rehearing was filed by the Erie Railroad Company, and testimony thereunder was taken June 28th, 1915, by the board. On July 9th, 1915, a report was made by the board denying the application for a rehearing. On July 22d, 1915, a *certiorari* was obtained by the Erie Railroad Company to review this report, determination or order, and on the 27th of September, 1915, an order was obtained from a justice of the Supreme Court granting leave to take affidavits on two days' notice. Such affidavits or depositions were taken on the part of the Erie Railroad Company before a Supreme Court examiner on September 30th, 1915. Many reasons have been filed by each of the prosecutors why the order of April 20th, 1915, should not be set aside. The reasons of all the prosecutors are substantially included within the seventy-eight reasons filed by the Erie Railroad Company and their amendments, except when the facts specially apply to a particular prosecutor. Under the *certiorari* obtained by the Erie Railroad Company to re-

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view the order denying a rehearing, the Erie Railroad Company has filed six separate reasons why that order should be set aside. Under section 38 of the Public Utility act of 1911, page 374, the Supreme Court is given jurisdiction, by petition, to review the order of the board and to set aside such order when it clearly appears that there was no evidence before the board to support reasonably such order, or that the same was without the jurisdiction of the board, or the order of the board may be reviewed by *certiorari* in appropriate cases.

All the points made by the counsel for the prosecutor are covered in the opinion of the court. To facilitate reference thereto, the numbering employed by the counsel for the prosecutor, the Erie Railroad Company, will be adopted in the opinion and adhered to throughout.

The writs of *certiorari*, other than those prosecuted by the Erie Railroad Company, will be disposed of in separate memoranda or opinions.

Before Justices GARRISON, TRENCHARD and BLACK.

For the prosecutor, *Gilbert Collins, George S. Hobart, Duane E. Minard and Herbert A. Taylor* (of the New York bar).

For the Board of Public Utility Commissioners, *Frank H. Sommer*.

For the city of Paterson and Board of Finance of said city, *Edward F. Merrey*.

The opinion of the court was delivered as follows:

I. The first ground of attack made by the prosecutor, the Erie Railroad Company, is on the construction of the statute. It is contended that the words, "such crossing," "a crossing," "the crossing," in the statute, indicate that it was the intention of the legislature to have only one crossing considered in any one proceeding. The petition of the city of Paterson prays for, and the order of the board of

public utility commissioners provides for, the separation or alteration of fifteen separate crossings. The board in its report determined that at each of the crossings involved, a condition exists such as was designed to be remedied by the statute. The question then arises as to whether it is practicable and feasible to alter such crossing.

The board further found that the entire subject is simplified by the acquiescence of all parties to the proceedings, that all of the crossings mentioned in the petition must be considered in any plan of elimination. There was no intimation from anyone that a change of a particular crossing only should be considered. It was not questioned but that a general plan for the alteration of grades at the crossings was practicable. The question then is: What was the legislative intent? The board having found the jurisdictional facts, which will be considered hereafter, does the statute limit the board to the alteration of a single crossing in a separate proceeding, or can two or more crossings, or a group of crossings, that are dangerous to public safety, or that impede public travel on such highways, and which are connected or related to one another, so that an alteration in the one necessarily makes an alteration in the other, be considered by the board under the statute, in a single proceeding, and a single plan be made for their alteration? It may be observed, in the first place, the statute does not expressly or inferentially prohibit such a proceeding, and second, if a restricted construction be placed upon the statute, the effect will be, as shown by this record, to leave those crossings in the cities of the state, where the greatest use is made of the highways, at the railroad crossings, and presumptively, where the greatest danger is, intact and not subject to alteration. No substantial reason is stated for limiting the construction of the statute to a single crossing, in a separate proceeding, excluding a group of crossings, where the record shows that much of the testimony applicable to one is applicable to all. The plan of alteration applicable to one, as a practical and engineering problem, is so intimately connected with all that it involves all the crossings, except, perhaps, Madison avenue

in section D, which will be considered hereafter. The record discloses no valid reason for so construing and limiting the operation of the statute. True, we are not concerned with the reasonableness or unreasonableness of the statute. Our duty is to find the intention expressed by the legislature and to give it effect. If a separate plan of alteration of each crossing and a separate proceeding is requisite, it would make it wholly impossible to alter any of the crossings, from a practical point of view, since the alteration of the several crossings must, as is conceded, proceed under a general plan. Such a purpose should not be attributed to the legislature, when the statute will reasonably admit of a different construction. In determining the meaning of a statute, the courts will keep in mind the circumstances surrounding its enactment and the objects sought to be obtained by the statute. *Alton, &c., Railroad Co. v. Vandalia, &c., Railroad Co.*, 268 Ill. 75; *Warner v. King*, 267 *Id.* 87. This being a remedial statute, it should receive a liberal, rather than a narrow, construction. As was said by Mr. Justice Dixon, speaking for the Court of Errors and Appeals, in reference to the first grade crossing statute, passed by the legislature (*Pamph. L.* 1874, p. 45): "The avowed object of these statutes is highly beneficent, and, therefore, its provisions tending towards the accomplishment of that object should be liberally construed." *Read v. City of Camden*, 54 N. J. L. 347, at 373. Subsequently this language was cited with approval, by that court, in the case of *Morris Dredging Co. v. Jersey City*, 64 *Id.* 587, 590.

The prosecutor does not point out, or even attempt to show, how or in what way, fifteen separate petitions, with fifteen separate hearings, would be more advantageous to it, but on the contrary, rather acquiesces in the idea that all the crossings mentioned in the petition must be considered in one plan of alteration, if alteration is to be made at all, and that a general plan of the alteration of the grades at the several crossings is practical as an engineering problem.

Mr. Brameld, the engineer of the prosecutor, the Erie Railroad Company, at page 509 of the record, testified, "There

are various changes which I think will have to be made." At page 526, "Of course, I haven't worked up the detailed solution of every one of them, but from my general knowledge of the situation, I think they could be taken care of," *i. e.*, the details. The testimony further shows that section D provides for the elimination of the crossing at Madison avenue, according to a plan submitted by the prosecutor, the Erie Railroad Company, known as *Exhibit R 105*, which is an estimated cost of \$192,133.92, less than the plan prepared by the city, and which carries Madison avenue over the tracks of the railroad, instead of under the tracks. We think the construction of the statute cannot be limited to a single crossing in a separate proceeding, but in a proper case, where the jurisdictional facts appear, several crossings may be considered in one proceeding, when so related to one another, that the consideration of the one necessarily involves the consideration of the other as a practical engineering problem.

The next ground of attack is that the evidence taken before the board of public utility commissioners does not justify, nor reasonably support the board's conclusion or findings. To that end, the insistence is, that this court has power and should review the board's findings of fact. We understand such to be the power of this court. The rule on this point is stated thus, by Chief Justice Gummere, speaking for the Court of Errors and Appeals, in the case of *West Jersey, &c., Railroad Co. v. Board of Public Utility Commissioners*, 87 N. J. L. 170; 94 Atl. Rep. 60: "That court (*i. e.*, the Supreme Court) can upon *certiorari*, or under the statutory procedure provided by section 38 of the act of 1911 (page 374), review such action for the purpose of ascertaining whether or not it is purely arbitrary, whether or not it has a reasonable basis to rest upon, whether or not it is supported to any extent by the facts submitted to the board for its consideration; and if it shall be made to appear to the court that such action is purely arbitrary, or that it has no reasonable basis upon which to rest, or is unsupported by the facts laid before the board, the court may declare it null and void, and order it to be set aside. So, too, if the board refuses to con-

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sider the matter at all, the court by *mandamus* can compel it to do so." *Public Service Gas Co. v. Board of Public Utility Commissioners*, 84 N. J. L. 463; 87 *Id.* 581; 95 *Atl. Rep.* 127; *Erie Railroad Co. v. Board of Public Utility Commissioners*, 87 N. J. L. 439; 95 *Atl. Rep.* 177.

Our reading of the record shows that a mass of testimony was presented to the board, particularly with reference to the various elements of danger and the impediments to travel, at all of the level crossings of the highways, such as a list of accidents, at some of the crossings; obstructions to the view of persons traveling along the highways in both directions; a series of photographs, made and produced by the railroad company, showing the obstructions to the view at each crossing; delays to travel in general; the fact that at the crossings where there are trolley tracks every street car is stopped, near the railroad crossing, until the conductor goes over it on foot and releases a derail switch; schedules made at different times as to the number of persons, vehicles drawn by horses, automobiles, bicycles and trolley cars passing over such crossings in a given period; testimony that the crossings were protected by gates and automatic bells; the number of trains and drill locomotives passing over the crossings within a given time; operations of gates, &c., from which the board found the facts, in its report, that each of the crossings was dangerous to public safety, and we think after reading the evidence, the conclusion of the board is supported by the facts that were before it. The question is one of fact to be determined according to the circumstances of each case. *Mayor, &c., of Newark v. Erie Railroad Co.*, 75 N. J. *Eq.* 20. This applies to both conditions called for in the statute, viz., that such crossings are dangerous to public safety, or the public travel on such highways is impeded. This, at the same time, disposes of the prosecutor's contention that the evidence as to one crossing cannot be extended to include other crossings, or that non-dangerous crossings cannot be ordered to be eliminated at the expense of the prosecutor, the Erie Railroad Company. This also was considered under point I.

In this connection may be considered point 22 of the brief of the prosecutor, the Erie Railroad Company. It is there urged that the prosecutor had the right to take additional testimony under the provisions of the *Certiorari* act. Such testimony was taken before a Supreme Court examiner and returned with the record, but as the prosecutor says, to use the words of the brief, the point is perhaps of comparatively small importance in the present case, for the reason that the affidavits and exhibits served but to explain the evidence and exhibits that were already in evidence. This renders it unnecessary to further consider this point. See, *Dubelbeiss v. Town of West Hoboken*, 82 N. J. L. 683.

But it is further urged, that the word "impede" has a well recognized meaning, having been used in many of the earlier charters of the railroad companies. The argument is that the obvious purpose of those statutes was to make the surface of the railroad ties and rails conform to the surface of the highway at a railroad crossing; that the rails and ties, as they passed the highway, would impede travel, and if the railroad happened to be constructed in a cut or on an embankment, the impediment to travel would thereby be increased; that the word "impede" refers to permanent physical obstructions due to the grade and construction of the railroad tracks, citing *North Manheim Twp. (Supreme Court, Pa.)*, 14 *Atl. Rep.* 137, and that the highway crossings are to be so constructed and maintained as not to unreasonably obstruct the use of the crossings by highway travelers. This is too narrow. The dictionary definition of the word "impede" is to place obstructions in the way of; obstruct; hinder; as, to impede progress. It is synonymous with check, hinder, delay.

The evidence in the record shows the public travel is impeded, in this sense, at each of these crossings, and the board so found. The word "prevent" is used in the early charters of the lessors of the prosecutor in place of the word "impede."

It is quite evident the rule, as to negligence and contributory negligence at grade crossings, as laid down by the courts, cannot be used as a guide in construing this statute, because

in these cases the statute requires the railroad company only to ring a bell or blow a whistle, under normal conditions, on the approach of a train to a grade crossing, at a distance of nine hundred feet. Then, too, there is a well-recognized distinction between actions, where the interest of the general public at crossings is involved and those which assert the rights of individuals who are injured. *Palmyra v. Pennsylvania Railroad Co.*, 62 N. J. Eq. 601.

II. The next ground of attack is that the order, under the statute, should have been directed to the two original chartered railroad companies, construing the words of the statute, "the company operating such railroad" to mean, the company which is charged with the legal duty of operating, or at least, that the order should have been directed to the prosecutor and the said two companies jointly, so that the expenses of altering the grades might be apportioned among all the companies in accordance with their several interests. The original companies are the Paterson and Hudson River Railroad Company, organized under *Pamph. L.* 1831, p. 24, and the Paterson and Ramapo Railroad Company, organized under *Pamph. L.* 1841, p. 97. They were leased by two separate leases, each dated September 9th, 1852, to a company known as the "Union Railroad Company." These leases were declared legal and valid by the legislature, March 14th, 1853. *Pamph. L.*, p. 480. This validating act speaks of the corporation or individuals *using* the aforesaid roads. By various assignments, foreclosures, proceedings and sales, the Erie Railroad Company, the present prosecutor, on November 14th, 1895, acquired title to all the property and rights of the two lessor companies. As stated above, the statute provides (section 1 of the act, *Pamph. L.* 1913, p. 91) that, "the company operating such railroad" and the expense (section 2), "shall be paid by such railroad, * * * the balance to be paid by the company operating such railroad."

On behalf of the two original companies, it is insisted that they do not directly or indirectly institute, direct or control any of the operations upon these respective roads, nor is the duty of operating such roads charged upon them by law.

The lease of the Paterson and Hudson River Railroad Company provides, "and that at the termination of the leases or either of them, any erections or improvements on the said above mentioned and demised property that may have been made by the parties of the second part, or their assigns, at their own expense, shall be paid for by the parties of the first part, at their appraised and just value." The lease of the Paterson and Ramapo Railroad Company has a like provision, but in different language. Both leases provide that the erections and improvements shall be valued by arbitrators, and the party of the first part shall pay and discharge the amount so valued to the parties of the second part or their assigns. Both leases, however, provide that "the parties of the second part do hereby covenant and agree with the parties of the first part, that the said parties of the second part, and their assigns, will keep and maintain and run said railroad and other premises hereby demised, in such manner, order and condition, as the said parties of the first part are bound to keep and maintain and run the same by the charter of the said parties of the first part, and the statutes supplementary thereto, and that they will indemnify and save harmless the said parties of the first part from all damages to which they may be subject by reason of said road and premises not being so kept, maintained and run." The prosecutor, in paragraph three of its answer, admits that it operates a railroad running through the city of Paterson.

The legislature's intention on this point is not obscure. Apt and precise words are used to express that intention, and, taken in connection with the provisions of the leases and the validating act of the legislature above referred to, the intention of the legislature cannot be misunderstood.

There is no reason why the courts should not give to the words used by the legislature their plain, natural meaning, viz., that power or instrument which puts in action and supervises the workings of the plant, the Erie Railroad Company, as being "the company operating such railroad." The dangerous conditions, to the elimination of which the act is directed, are the result of the operation of the railroad, by the

Erie Railroad Company, against whom the order is directed in accordance with the plain terms of the statute.

III. The next ground of attack is based upon that clause of the statute which provides that the board *may* order the company operating such railroad to alter the crossing. The insistence is, if the statute is construed to confer on the board arbitrary power to order or refuse to order the alteration of the grade crossings, in its discretion, the statute is invalid. It is conceded that the board could constitutionally be delegated power to determine whether or not certain facts exist, but when such facts have been found, it is urged the statute then leaves it to the board to decide arbitrarily whether it will or will not make an order for the alteration of the crossings.

The obvious answer to this point of the prosecutor is the fact that the prosecutor was required by the order to make the alterations and changes in the grades, so, as to it, the statute is mandatory, and if the facts before the board justify the order, it is not arbitrary. The prosecutor is not concerned with what might be ordered to be done by someone else, by the board of public utility commissioners.

There is a line of authorities, however, which hold that "*may*" in a statute means must or shall. Thus, in England, in the case of *King v. Barlow*, 2 Salk. 609, it was said that the word "*may*" in a statute shall be taken to be mandatory, where the thing to be done is for the sake of justice or the public good. So, Chancellor Kent, in the case of *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 113, said, in respect to statutes, the rule of construction seems to be that the word "*may*" means must or shall only in cases where the public interests and rights are concerned, and where the public or third persons have a claim, *de jure*, that the power shall be exercised. These cases were cited with approval by our courts in the cases of *Davison v. Davison*, 17 N. J. L. 169; *Seiple v. Borough of Elizabeth*, 27 Id. 407; *Atlantic City Water Works Co. v. Read*, 50 Id. 665. So, there is a line of authorities which hold that the agencies of government do not act automatically. It is necessary to vest in its officers certain general powers with a discretion in the governmental agents as to

their exercise. It would be as impracticable, as it is undesirable, to attempt to formulate in advance a set of hard and fast rules by which every conceivable public act should be governed. In order to accomplish the ends of local government, it has been found expedient to create various boards and commissions, which are charged with the duty of supervising, directing and controlling particular subjects. It has been held that the granting of such power by the legislature was not a grant of either legislative or judicial power. *People v. Roth*, 249 Ill. 532. For other illustrative cases see *In re Connecticut Company (Conn.)*, 94 Atl. Rep. 992; *In the Matter of New York Elevated Railroad Co.*, 70 N. Y. 327; *Trustees of Saratoga Springs v. Saratoga Gas, &c., Co.*, 191 Id. 123; *Alton, &c., Railroad Co. v. Vandalia, &c., Railroad Co.*, 268 Ill. 68.

It is further urged that if the court should hold the statute valid, still the order in the present case should be set aside, for the reason that it is insisted the evidence shows without dispute that the prosecutor has not, and in all reasonable probability will not have, sufficient funds for the purpose of meeting the cost of complying with the order. The determination of this question is one of fact, in the first instance, devolving upon the board of public utility commissioners. The board had before it the financial history of the Erie Railroad Company, its indebtedness, its income and many other details bearing upon the finances of the company, and from this evidence the board found adversely to the prosecutor, the Erie Railroad Company. After a careful reading of the voluminous testimony on this point, we are unable to say that the board's determination is without sufficient facts to support its conclusion. The prosecutor has eight years in which to comply with the order of the board and do the work. Where the work is in itself a reasonable, proper and fair exaction, when considered with reference to the object to be attained, the expense is not a reason against its legality (*Health Department of the City of New York v. Rector, &c., of Trinity Church*, 145 N. Y. 32; 27 L. R. A. 710; *Woodruff v. New York, &c., Railroad Co.*, 59 Conn. 63), the order

being based upon and made in an exercise of the police power, which is a part of the reserve power of the state.

Point VIII. is, that the order of the board is invalid, in so far as it requires the prosecutor to make changes in switches, side tracks, leads, bridges, yards, structures and other facilities and property of the prosecutor and of other companies, co-partnerships or individuals.

We think in this respect the order properly interpreted is justified by the statute properly construed.

The statute authorizes the board, in a proper case, to order the railroad to alter grade crossings according to plans to be approved by the board, by substituting therefor crossings not at grade, either by carrying the highway under or over the railroad, or by reconstructing the railroad under or over the highway, or by vacating, relocating or changing the lines, width, direction or location of the highway and the opening of a new highway in the place of the one vacated, and this includes the power to order such changes in the property and facilities of the railroad company as are fairly incidental to, or rendered necessary by, the alteration of the crossings.

Now, the order of the board directs the railroad company "to alter such crossings, and each of them, according to the plan therefor annexed to and made part hereof * * * and profile of same, also annexed to and made part hereof, * * * which said plan and profile are hereby approved; by substituting therefor crossings not at the grade of the public highways known as Madison avenue, Straight street, Clay street, Market street and Park avenue, Ellison street, Van Houten street, Broadway, Fair street, Hamilton avenue, Lafayette street, Keen street, Warren street, Putnam and River streets; by changing the lines, width and direction thereof and carrying so much thereof as so changed under the said railroad, except in the case of Madison avenue, which is carried over the railroad, according to and as shown on said plan and profile for said purpose, and by vacating the remaining parts of said highways within the lines of the right of way of said railroad company, and further, by vacating that part of Madison avenue lying west of the railroad which is included

between the right-of-way line of the railroad and the line of the relocated Madison avenue; by substituting for the existing crossings at Cedar street a crossing under the railroad at Taylor street, and for the existing crossing at Franklin street a crossing under the railroad at Montgomery street, and also by widening and altering the existing highways known as Essex street, Governor street and Fulton street, adjusting the structures spanning them to the proposed grade or grades (which said new highways shall be located, and of the width, length and direction and carried over or under the said railroad where so indicated); by reconstructing said railroad and highways and by performing all other work required according to and as shown on the said plan and profile."

It, therefore, appears, we think, that the order is confined in its direction to the company to the alteration of the crossings in question by changing the highways and by reconstructing the railroad and by performing such work as is required thereby. It does not require the railroad company to make changes in private sidings, and the like, not its property, and not within the limits of its right of way. The closing words of the order, "and by performing all other work required according to and as shown on said plan and profile," do not affect this conclusion as to the scope of the order. These general words follow specific provisions of the order, and under an elementary rule of construction are limited thereby. Further, they refer back to the introductory general mandate of the order requiring the company to "alter said crossings, and each of them," and are limited thereby.

Neither does the order require the owners of such private sidings to reconstruct them. The plan which accompanies the order simply suggests to such owners a method by which their property may be conformed to the new conditions so as to admit of a continuance of the siding facilities theretofore enjoyed. The order only requires others than the railroad company to make such changes in, and removals of, their property and construction as are necessary to carry the order and plan into effect. In this it accords with section 4 of the statute. Since the mandate of the order to the rail-

road company is limited to requiring the changing of highways and the reconstruction of the railroad, the changes in, or removal of, such private sidings cannot be said to be necessary to carry the order to the railroad into effect. Of course, the plan does indicate a way in which, in part, existing siding facilities may be continued after the ordered changes in the highways and the ordered reconstruction of the railroad are made. It is appropriate that it should do so, for, in the adoption of a plan, the effect thereof in existing industrial facilities should be taken into account, and this factor should also be taken into consideration in determining whether the plan adopted is reasonable or unreasonable.

As we have pointed out, in so far as the order directs the prosecutor to make changes in its own side tracks, and the like, it was within the power conferred by the statute if such changes were fairly incidental to the changes of grade of the main line tracks. We think that such ordered changes were of that character.

Point IX. is, that the order is invalid, in so far as it requires changes in the construction and location of the station building at Market street and the station building at River street.

We think this point is not well founded in fact.

The order (leaving out of account the plan and profile) does not require any change in the construction or location of these station buildings. It does not deal with them. The plan and profile do display reconstructed stations at new nearby locations. If these changes are fairly incidental to the changing of the highways or the reconstruction of the railroad, they are deemed to be a part of the order and must be made. That some reconstruction of both stations is rendered necessary by the reconstruction of the railroad, and will have to be made some time, either according to the judgment of the railroad managers or as may be lawfully directed by the public utility board, is not questioned. But it is contended that the change in the location of the stations was not fairly incidental to the changing of the highways or the reconstruction of the railroad. If so, the reconstruction of the

stations at new locations is not required by the present order. Upon full consideration we think that is so. We do not find that the change in the location of the stations was incidental to, or rendered necessary by, the elimination of the grade crossings. Accordingly, we hold that the order under review does not require the railroad company to reconstruct these station buildings at the new locations as indicated and suggested upon the plan. No doubt, section 17 (b) of the Public Utility act (*Pamph. L. 1911, p. 379*), conferring upon the board power, "after hearing upon notice," to require a public utility "to furnish safe, adequate and proper service and to keep and maintain its property and equipments in such condition as to enable it to do so," is ample to authorize the board, in a proper case, to order the relocation of a railroad station. But this was not a proceeding under that section. Aside from the fact that such relocation was not ordered, it will be noticed that such changes were not asked for in the petition. There was no hearing and no evidence upon the question whether the existing stations at these points were safe, adequate and proper, nor was any notice given to the prosecutor that such question was to be passed upon by the board in this proceeding, other than such as might be inferred from the "suggestion" of the city engineer that such changes might be desirable if the tracks were elevated.

Point X. is, that the order is invalid, in so far as it requires the prosecutor to construct structures upon its lands for the use of Fuller's Express Company and Morris & Company, in substitution for the structures now occupied by them as lessees and which will be rendered useless by the elimination work.

It is true that the plan adopted by the board has indicated upon it suggested possible locations upon the lands of the railroad company of substituted structures for these private companies, but it does not require the railroad company to provide such locations or to erect such structures, since neither the existing structures nor the suggested structures constitute any part of the railroad. This matter is sufficiently discussed under point VIII.

Point XI. is, that the statute and order, in so far as they permit or require the prosecutor to make certain changes in the properties of the Public Service Railway Company, and in so far as they limit the proportion of the expense of the alterations in certain of the grade crossings to be paid by the street railway using the same, are unconstitutional and invalid.

The alleged unconstitutionality of the imposition by section 2 of the statute of not exceeding ten per centum of the cost directly chargeable to the elimination of the grade crossings used by the street railway upon that company, is dealt with elsewhere in this opinion.

The contention that the order is invalid, in that it requires the prosecutor to do the physical work of removing and changing the property of the Public Service Railway Company, is not well founded in fact. The order does not require the prosecutor to do that. It requires the Public Service Railway Company to change and remove such of its property and construction as is necessary to carry into effect the order, and further directs that both the prosecutor and the Public Service Railway Company keep specific and complete records of the expenses directly chargeable to the crossings, and each of them, so used by such street railway company.

The order directs the Public Service Railway Company to pay ten per centum of the expenses of the changes required by the order directly chargeable to the crossings used by it. This was the maximum amount allowed by the statute and, of course, the prosecutor cannot complain that it was so limited.

Point XII. is, that the statute and order are unconstitutional and invalid, in so far as they permit or require the prosecutor to make changes in the existing streets with respect to grade, width and structure, and to make other changes by the abolition of existing crossings and the substitution of other crossings therefor on new highways.

We have elsewhere herein indicated that the statute in this respect violates no constitutional provision. We also think

that the order in this respect is within the powers conferred by the statute. The changes required in respect to the grade and width and structure in existing highways which remain, and those requiring the abolition of existing crossings (and the substitution of other crossings) therefor on new highways, are all fairly incidental to, and were rendered necessary by, the separation of grades, having reference to the interests of the railroad company as well as those of all the people who have occasion to cross the railroads. Being so regarded, it is valid. *In re Selectmen of Norwood*, 161 Mass. 259; 37 N. E. Rep. 199; *Davis v. County Commissioners of Hampshire County*, 153 Mass. 218; 26 N. E. Rep. 848.

In so far as the execution of such order may require the exercise of the power of eminent domain, it will be seen that section 13 of the General Railroad act as now amended (*Pamph. L.* 1914, p. 490), confers upon the railroad company power to take by condemnation any land and property required for the purpose of complying with any order made by the board of public utility commissioners. It will also be noticed that the owners of property to be taken have no right to be made parties to, or to demand a hearing in, this proceeding. *In re Directors of Old Colony Railroad Co.*, 163 Mass. 356; 40 N. E. Rep. 198. It is also to be noticed in this connection that, under the charter of the city of Paterson, the city has ample power to lay out, open, change, alter or vacate the streets involved, and to take such lands and real estate as may be necessary therefor. *Pamph. L.* 1871, p. 846, § 92; *Pamph. L.* 1907, p. 114; *Pamph. L.* 1910, p. 524; *Pamph. L.* 1911, p. 179. Under this latter act the board of public works of Paterson has power to vacate streets. *Sherwood v. City of Paterson*, 88 N. J. L. 456, 738. The order directs the railroad company, the city of Paterson and all other parties to proceed with due diligence to the execution of the order and to comply with all the requirements thereof. Of course, in carrying out its part of the order, the city of Paterson must act in conformity with its charter and the laws amending the same. *Clark v. City of Elizabeth*, 61 N. J. L. 565.

Point XIII. is, that the order in so far as it requires the prosecutor to reconstruct the railroad is invalid because not made in accordance with the statute; and that the statute is unconstitutional because it does not permit the public utility board to order the elimination of the grade crossings by depressing the highway in part or by elevating the railroad in part.

We think there is no merit in this contention for reasons elsewhere stated in this opinion.

Point XIV. is, that the order is invalid and the statute is unconstitutional in so far as they require the elimination of grade crossings of highways laid out after the railroad tracks were constructed.

There is no merit in this point. We have elsewhere sufficiently indicated that we think that such a requirement in a statute would not render it unconstitutional. Undoubtedly the statute in question applies alike to highways existing at the time of the construction of the railroad and to highways subsequently laid out. The order in the respect mentioned is therefore within the powers conferred by the statute. *Worcester, N. and Railroad Co. v. City of Nashua*, 63 N. H. 593; 4 Atl. Rep. 298; *New York and N. E. Railway Co. v. City of Waterbury*, 60 Conn. 1; 22 Atl. Rep. 439; *Northern Pacific Railway Co. v. State of Minnesota, ex rel. Duluth*, 208 U. S. 583.

Point XV. is, that the statute and order are unconstitutional and illegal in so far as they require the prosecutor to reconstruct highways outside of the right of way of the prosecutor at the crossings.

With respect to the suggestion that the statute is unconstitutional for such reason we have nothing to add to what we have elsewhere said.

With respect to the contention that the order is illegal in that it requires the railroad company to make changes in the highways outside of its right of way at its own expense, we say that it appears that such changes are fairly incidental to the changes in the crossings of the railroad and are therefore

proper. *In re Selectmen of Norwood, supra; Davis v. County Commissioners of Hampshire County, supra.*

Point XVII. is, that the order is unreasonable in that it requires the prosecutor to alter the crossings according to a plan which is more expensive to the prosecutor than is necessary for the purpose of removing the danger to public safety or the impediment to public travel.

The real complaint under this point is that the board refused to adopt certain modifications suggested by the prosecutor respecting the plans for the elimination of crossings at Keen, Warren and River streets, and for the consolidation of the crossings at Straight and Clay streets.

But we think that the propriety of the plan adopted by the board is amply supported by evidence. This court will not disturb such a finding unless it be unreasonable, or based upon some illegal principle, or lacks evidential support. *Public Service Railway Co. v. Public Utility Board*, 87 N. J. L. 250.

Point XVIII. is, that the order is unreasonable, in that (a) it arbitrarily limits the dates of the beginning and completion of the work; (b) it arbitrarily requires the work to be done in designated divisions and in the sequence of such divisions, and (c) it makes no provision for such changes or modification of details of the plan as may become necessary during the progress of the work.

With respect to the first two propositions we are clearly of the opinion that the times fixed, and the division of the work, are entirely reasonable and proper.

Passing now to the other complaint. The fact that the order makes no provision for such modifications of the details of the plans as may become necessary during the progress of the work, is no reason for setting it aside. There is a reasonable presumption in favor of the plan adopted by the board. *In re Selectmen of Westborough*, 169 Mass. 495; 48 N. E. Rep. 763. If, in the course of executing the order unforeseen contingencies arise, or details are found to require change or things required become unnecessary by reason of changed conditions, or for any other cause, the order made

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and plan adopted by the board may be modified on application. Section 31 of the Public Utility act provides that the board may at any time modify an order made by it. *Pamph. L.* 1911, p. 386.

The constitutional objections argued by counsel for the prosecutor will be considered in the order in which the points are presented in his brief.

Point IV. That the statute is unconstitutional because it takes the property of the prosecutor as the lessee and operator of the railroads owned by the Paterson and Hudson Railroad Company and the Paterson and Ramapo Railroad Company for the private use and benefit of the said two companies, the respective owners of said railroads.

The argument is, that inasmuch as the order for grade crossing elimination calls for the permanent improvement at the expense of the operating lessee of the property owned by the lessors, the money of the lessee so expended is taken for the private use of the owners of the property so improved. Is this so in point of fact? The lease of the Paterson and Hudson River Railroad Company to the Union Railroad Company, made on September 9th, 1852, and assigned to the New York and Erie Railroad Company, contains the following provision: "And it is in like manner further agreed by and between the parties to these presents, that if any erections or improvements shall, during the said term hereby demised, or any future term or terms hereafter demised, be made on said demised premises or appurtenant thereto, the same shall, at the termination of said term or terms, and the cessation of the interest of the parties of the second part of, in and to the same, by the expiration thereof, or other termination thereof, be valued by arbitrators, to be appointed in like manner as last above provided, and the award of a majority of such arbitrators shall be conclusive as to the value of the said erection and improvements; and the parties of the first part shall pay and discharge the amount so valued to the parties of the second part or their assigns."

The lease from the Paterson and Ramapo Railroad Company to the Union Railroad Company, and assigned to the

New York and Erie Railroad Company, contains a precisely similar covenant.

Such permanent erections or improvements and the moneys thereon expended are not therefore taken for the private use of the lessors in the sense contemplated by the constitution; upon the contrary, such improvements are to be used and enjoyed by the lessee during its term, and if taken at all by the lessor are to be paid for at their value, which may be greatly in excess of their cost. Such a prearranged purchase is not the taking of property *in invitum* that is reprobated by the constitutional provision on which the argument is based.

These same considerations apply also to the second contention made under this point in the brief, viz., that compliance with the order constitutes a confiscation of the property of the prosecutor, because of the cost of such compliance.

The broader ground, however, by which both of these contentions are met is that the provisions in question of the Fielder act constitute a regulation adopted by the legislature for public safety under the police power of the state, and hence are not a taking of private property without just compensation, although conformity to such regulation involves expense. This is the language of our Court of Last Resort, delivered by Mr. Justice Depue, in the case of *Morris and Essex Railroad Co. v. City of Orange*, 63 N. J. L. 252. This definitive statement and concrete application of the police power is sufficient authority for this court, in the present case, unless it be necessary that whenever the police power is mentioned an essay on the subject shall be delivered; on the contrary, it would seem that the proper way for a lower court to deal with an established rule of law was to treat it as established.

Inasmuch, however, as a federal question is involved, it may be well to quote from one of the most recent decisions of the Supreme Federal Court. In the case of *Chicago, Milwaukee and St. Paul Railway Co. v. Minneapolis*, 232 U. S. 430, Mr. Justice Hughes, delivering the opinion of the court, said:

"It is well settled that railroad corporations may be re-

quired, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways newly laid out over their tracks, or to carry their tracks over such highways." Citing a large number of cases in the state and federal courts.

Other specific illustrations of the application of this established rule to the elimination of grade crossings are: *Davis v. County Commissioners*, 153 Mass. 218; *N. Y. & N. E. R. R. Co. v. Bristol*, 151 U. S. 556; *In re Selectmen of Norwood*, 161 Mass. 259; *Illinois Central Railroad Co. v. Copiah County*, 81 Miss. 685; *City of Harriman v. Southern Railway Co.*, 111 Tenn. 538; *St. Louis and Santa Fe Railway Co. v. Fayetteville*, 75 Ark. 534; *C. B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561; *Cincinnati, I. & W. R. R. Co. v. Connersville*, 218 Id. 336; *Chicago, M. & St. Paul R. R. Co. v. Minneapolis*, 232 Id. 430; *Mo. & Pac. Ry. Co. v. Omaha*, 235 Id. 121.

Upon the point that these federal decisions, especially the two last cited, extend the rule of some of our earlier state decisions, it is to be remarked, first, that there is no conflict as to the fundamental doctrine of the police power but only as to its application, and secondly, that as to due process of law, and other matters involving ultimately a federal question, the decisions of state courts yield to those pronounced upon such questions by the supreme federal tribunal.

Point V. Which is, that the statute under review is unconstitutional because it deprives the prosecutor of its property without due process of law or just compensation, in that it requires the entire expense of abolishing the grade crossings to be paid by the prosecutor, is fully answered by what has just been said under the previous point. We have nothing to add excepting that the case of *New York and New England Railroad Co. v. Bristol*, 151 U. S. 556, on which counsel relies for his main argument, has been stripped of the force accorded to it by counsel by the more recent case of *Chicago, Milwaukee and St. Paul v. Minneapolis*, in 232 U. S.

The contention that the legislature could not lawfully limit the proportion of expense to be borne by the street railway

company to ten per cent. of the total expense of the alteration of a crossing is, of course, unsound if the entire expense might at the legislative will have been placed upon the prosecutor. The opposite contention, viz., that the imposition of any part of the expense upon the trolley company was unlawful is, of course, not now under consideration.

The same remark applies to the limitation of the expense imposed upon the municipality affected.

Under this point there is also a running attack made upon the principle of utility boards in general, involving their powers as well as their procedure, but as far as discoverable no constitutional limitation is pointed out or discussed. Under this subhead similar boards in other jurisdictions are described and the differences noted, but no constitutional question raised that is not covered, as far as we are able to do so, by the principles decided in the cases already cited.

Point VI. is, that "Said statute is unconstitutional and said order is unreasonable, for the reason that the prosecutor is not given the alternative of decreasing or eliminating the alleged danger to public safety and the alleged impediment to public travel by decreasing the number of train movements or by abandoning the railroad." In so far as this reason challenges the discretion exercised by the board in making its order we are not concerned with it in this part of our opinion; in so far as it constitutes an attack upon the statute the contention must be that the legislative act was unconstitutional because it did not affirmatively authorize the railroad company to decrease the number of its trains or to abandon its railroad.

The abandonment of the railroad was not germane to the object of the statute, and the power to deal with that question could not be delegated to the agency created by the act.

The decrease in the number of train movements was a matter primarily under the control of the prosecutor, and hence required no statutory permission; if by such decrease the danger and congestion at the crossings were in fact eliminated or reduced to a negligible point that fact would doubtlessly be recognized by the board and dealt with accordingly. It was

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for the prosecutor to make that fact appear and its failure to do so involved no constitutional infirmity in the statute.

Point VII. is an attack upon the title of the original Public Utility act of 1911, and upon the duality of the objects alleged to be embraced in that act as supplemented by the Fielder act of 1913.

The title of the original act expresses broadly and inclusively the object of the statute; it does not express the means and methods of attaining that object, but this is not required. *Bumstead v. Govern*, 47 N. J. L. 368; *affirmed*, 48 Id. 612; *Hickman v. State*, 62 Id. 499; *affirmed*, 63 Id. 666.

As was said by this court in *Moore v. Burdett*, 62 N. J. L. 163, 164: "The object of a law must not be confused with its product. * * * The object of every law, by force of the constitution must be single and be expressed in the title of the law; the product may be as diverse as the object requires and finds its expression in the terms of the enactment only. In fine, the title of an act is a label not an index." The statute has, in a constitutional sense, a single object. To attain this object it enacts various methods and matters so related to such object and to each other as to effectuate a single purpose. The inclusion of such inter-related matters is not the intermixing of things that have no proper relation to each other, hence the statute as a whole has a single object. *Payne v. Mahon*, 44 N. J. L. 213; *Newark v. Mt. Pleasant Cemetery Company*, 58 Id. 168.

Point XVI. is, that "The statute and order violate the constitution of the United States in that they impair the obligation of the prosecutor's contracts as follows:

"(a) Contracts with the holders of the prosecutor's stocks, bonds, notes and other obligations.

"(b) Contracts between the State of New Jersey and the prosecutor or its predecessors in interest.

"(c) Contracts between the prosecutor or its predecessors and the Public Service Railway Company or its predecessors.

"(d) Contracts between the prosecutor and the various switch owners.

"(e) Contracts between the Paterson and Hudson River

Railroad Company and Ramapo Railroad Company, and the prosecutor or its predecessors."

These objections may be considered together, since, despite their apparent diversity, they rest upon a common principle and present but a single legal question, to wit, whether these contracts whenever made or upon whatever consideration based were subject to the future exercise by the state of its police power. The specific application of the general doctrine treated under point IV. to the obligation of contracts is well stated by Mr. Justice Depue in *M. & E. Railroad Co. v. Orange*, where after pointing out that certain New York and Connecticut decisions were placed upon the ground that the charters of the respective companies were subject to alteration or repeal, but that the opinion of the Connecticut court and of the Supreme Court of the United States in *New York and New England Railroad v. Bristol*, 62 Conn. 252; 26 Atl. Rep. 122; 151 U. S. 556, lays stress upon the fact that the regulations were a proper exercise of the police power of the state, he said: "In *Boston and Maine Railroad Co. v. County Commissioners*, 79 Me. 386; S. C., 10 Atl. Rep. 113, an act requiring the expense of building and maintaining so much of the townway or highway as was within the limits of the highway where such way crossed the track at grade, should be borne by the railroad company, was held to be constitutional. This decision was made against a company whose charter provided that it should not be altered, amended or repealed. The power of the legislature to impose such burdens for general safety under the police power was declared to be fundamental and that the act did not impair any contract in the company's charter. Whether the corporation has an ir-repealable contract in its charter or not is immaterial. Police powers are inherent in the government and the legitimate exercise of legislative power in securing public safety does not impair the obligation of contracts nor deprive anyone of property without due process of law." 63 N. J. L. 252, 264.

A later expression of the same thought by the Supreme Court of the United States speaking through Mr. Justice Day is as follows: "The exercise of the police power cannot be

limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contract rests, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to public safety. *Chicago, Burl. & Q. Railroad Co. v. Nebraska*, 170 U. S. 57." *Northern Pacific Railway Co. v. Minnesota*, 208 U. S. 583.

Many of the cases cited under point IV. are to the same effect and sustain the same doctrine, the acceptance of which renders it unnecessary and indeed futile to follow the brief in its recapitulation of the hardships that result from the observance of such legal rule.

That the contracts of the railroad with others for switch connections and service were subject to the police power was held by the Court of Errors and Appeals in *Swift v. Delaware, Lackawanna and Western Railroad Co.*, 66 N. J. Eq. 34.

Cases in other jurisdictions are: *Branson v. Philadelphia*, 47 Pa. St. 329; *Kinealy v. St. Louis, Kansas City and Northern Railroad Co.*, 69 Mo. 658; *Otis Elevator Co. v. Chicago*, 263 Ill. 419.

As to the Public Utilities, the doctrine of their subservience to the police power is the same. *Jersey City v. City of Hudson*, 13 N. J. Eq. 420; *Stillwater Water Co. v. Stillwater*, 50 Mo. 498; *Detroit v. Fort Wayne and Elmwood Railway Co.*, 90 Mich. 646; *Columbus Gas and Coke Co. v. Columbus*, 50 Ohio St. 65; *Natick Gas Co. v. Natick*, 175 Mass. 246; *New England Telegraph and Telephone Co. v. Boston Terminal Co.*, 182 Id. 397; *New Orleans Gas Light Co. v. Drainage Commissioners*, 197 U. S. 453.

Point XIX. is, that "Said order imposes a burden upon the interstate traffic of the prosecutor and interferes with and impairs its operation to perform its duty as an interstate carrier of freight and passengers because:

"(a) It requires changes in the location or grade of switches, side tracks, leads, bridges, yards, structures and other facilities and properties of the prosecutor which are used by the prosecutor in the furtherance of its interstate business.

"(b) It compels the prosecutor to raise and expend moneys

for the purpose of complying with said order, which said moneys would otherwise be available for and would be used by the prosecutor in the making of changes and improvements which are essential for the purpose of enabling the prosecutor to carry on its interstate business."

Whether or not the police regulations of a state constitute an unlawful interference with interstate commerce is distinctly a question for the ultimate decision of the highest federal court. The attitude of that court upon this question is well expressed by Mr. Justice Gray, delivering the opinion of the court in the case of *Chicago, M. & St. P. R. R. Co. v. Solan*, 169 U. S. 133, 137:

"The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

So long as this attitude is maintained by the federal court the doctrine enunciated by it would gain nothing by our concurrence and suffer nothing by our dissent. We, however, not only recognize the authority but also concur in the soundness of the rule laid down.

Point XX. is, that "Said order is in violation of the constitution of the State of New Jersey and of the United States, in so far as it deprives the prosecutor of the rights, benefits, advantages, privileges and contracts now possessed by it with reference to the several leads, switches and side tracks which under said order are required to be destroyed or relocated and reconstructed, for the following reasons." Upon this point we can add nothing to what has already been said in discussing the scope and dominance of the police power.

Point XXI. is, that "Said order and the statute upon which same is based are in violation of the constitution of the State of New Jersey, because:

"(a) They impair the jurisdiction of the courts of equity of the State of New Jersey by depriving them of their jurisdiction over the regulation of the use of easements.

"(b) They impair the jurisdiction of the courts of law of the State of New Jersey by depriving them of their jurisdiction to compel the performance of the duties imposed by law upon the prosecutor or its predecessors in interest."

As to the alleged invasion of the exclusive jurisdiction of the Court of Chancery to regulate conflicting public easements, our decision might well rest upon the reasoning of the opinion of Mr. Justice Kalisch, in this court, in the case of *Erie Railroad Co. v. Board of Public Utility Commissioners*, 87 N. J. L. 438. In view, however, of the argument of counsel, and the attempt to distinguish that case from the present one, it will be as well to point out that there is an essential difference between the jurisdiction exercised by Chancery over conflicting public easements and the exertion by the legislature of its police power to avert danger at railway crossings. Under the inherent power of the Court of Equity all questions as to the existence, character, duration and priority of such conflicting easements, together with their respective paramountcy or subservience, as well as questions of acquiescence, estoppel, contribution and expense, are considered by the Court of Chancery, and are either adjudicated by it or are relegated to a court of law for decision, as the case may be; whereas, in the legislative exercise of its police power all of these matters are determined by the statute, leaving nothing of a judicial nature to be adjudicated by the statutory tribunal excepting the applicability of such legislative scheme to a given state of facts, if it be found to exist, and the determination thereupon of the practical methods of accomplishing the legislative object. This exercise by the legislature of its police power which, in its simplest expression, is illustrated in statutes requiring the erection of safety gates, the posting of flagmen and the giving of audible

signals, long antedated the adoption of the constitution of 1844, so that the jurisdiction of the Court of Chancery, that was confirmed by that instrument, was not exclusive in respect to the exercise of such powers by the legislature, even if the jurisdiction of equity at any time was or could be exclusive as to such exercises of this sovereign power, which is not for a moment admitted even for the purposes of argument.

In the case of *Palmyra v. Pennsylvania Railroad Co.*, 62 N. J. Eq. 601, the contention of the railroad was that powers of this nature were so essentially legislative that they could not constitutionally be exercised by the Court of Chancery under legislative authority, which is the precise opposite of the contention of the prosecutor in the present case. The truth is that neither extreme view is the proper one; the correct view being that the mixed administrative and quasi-judicial functions to be performed by the board of public utilities commissioners under the statute, which do not, in a constitutional sense, properly belong to either of the three great departments of government may, because of that circumstance, be lawfully exercised under express legislative authority by a statutory tribunal without infringing upon the constitution itself or upon the prerogatives of the Court of Chancery. This principle, although not this precise application of it, is illustrated in *Paul v. Gloucester County*, 50 N. J. L. 584; *Moreau v. Freeholders of Monmouth*, 68 Id. 480; *Ross v. Freeholders of Essex*, 69 Id. 291; *Iowa Life Insurance Co. v. Eastern Mutual Life Insurance Co.*, 64 Id. 340; *In the Matter of Drainage of Lands*, 35 Id. 497; *Palmyra v. Pennsylvania Railroad Co.*, *supra*; *Eckert v. Perth Amboy and W. Railroad Co.*, 66 N. J. Eq. 437.

As to the alleged impairment of the *mandamus* power of this court, what has just been said as to the Court of Chancery, measurably covers this matter also, at least in principle.

There is, however, another doctrine peculiar to the prerogative writs of this court, viz., that stated by Mr. Justice Trenchard, in *Newark v. Kazinski*, 86 N. J. L. 59, to the effect that where this court may by its writ of *certiorari* supervise the action of a statutory tribunal, the fact that such

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tribunal is exercising under legislative authority powers similar to or identical with those exercised by this court under its prerogative writs, is a negligible circumstance. The question is, however, almost, if not entirely, academic, since the functions exercised by the statutory board in this case do not bear the slightest resemblance to the *mandamus* function of this court.

We have now reviewed *seriatim* the points of constitutional law as presented in the elaborate brief of counsel for the prosecutor without finding that any of them requires us to declare invalid the statute of 1913 as a whole or as to any of its essential features. If any other constitutional question has been argued by counsel incidentally and outside of his stated points, it may upon that account have escaped our attention, but it will, nevertheless, we confidently believe, be found to be covered by the principles we have discussed and by the cases cited to illustrate them.

The conclusion that we have reached from the foregoing considerations of all of the reasons filed and argued by the prosecutor, is that each of the orders of the board of public utility commissioners, brought up by the two writs of *certiorari* in this case, should be affirmed, with costs.

CONRAD PETERSEN, PLAINTIFF AND APPELLANT, v.
MAYOR AND ALDERMEN OF JERSEY CITY, DEFEND-
ANT AND APPELLEE.

Submitted March 16, 1916—Decided June 20, 1916.

1. The act of April 12th, 1915 (*Pamph. L.*, p. 470), providing that when a judgment has been recovered and where an execution thereon has been returned unsatisfied, the judgment creditor may apply to the court and secure an order for execution against the salary, &c., of the judgment debtor, applies as well to judgments recovered and executions returned prior to the passage of the act as those after.

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2. The act of April 12th, 1915 (*Pamph. L.*, p. 470), permits of an execution against the salary of a municipal officer.
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On appeal from the Second District Court of Jersey City.

Before Justices GARRISON, TRENCHARD and BLACK.

For the appellant, *Lewis Fisher* and *Abram H. Cornish*.

For the appellee, *Thomas J. Brogan*.

The opinion of the court was delivered by

TRENCHARD, J. On December 12th, 1906, the plaintiff recovered a judgment in the District Court against Charles G. Craft, a policeman of Jersey City, for \$91.33. An execution was issued thereon and returned unsatisfied.

On August 12th, 1915, the plaintiff obtained an order from the court pursuant to the act of April 12th, 1915 (*Pamph. L.*, p. 470), directing that an execution issue against the salary, &c., of Craft to the extent of ten per centum of his salary. Such execution was duly served upon Jersey City, by whom Craft was then employed. The city refused to pay, and this suit was brought in the District Court against Jersey City for the percentage due. The learned trial judge concluded that the statute pursuant to which the order was made had no application where as here the judgment sought to be satisfied was recovered prior to the passage of the act, and accordingly rendered judgment for the defendant.

The first question presented to us is: Was the conclusion of the trial judge right as to the scope of the statute?

We are of the opinion that it was wrong.

We have already held that the act of April 12th, 1915 (*Pamph. L.*, p. 470), providing that when a judgment has been recovered, and where an execution thereon has been returned unsatisfied, the judgment creditor may apply to the court and secure an order for execution against the salary, &c., of the judgment debtor, applies as well to judgments recovered and executions returned prior to the passage of the

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act as those after. *Russell v. Mechanics' Realty Co.*, 88 N. J. L. 532.

The city now contends, however, that the statute does not permit of an execution against the salary of a municipal officer. We think it does.

There is nothing in the act to indicate that the scope of the execution is so limited. On the contrary, section 2 thereof (*Pamph. L.* 1915, p. 471) provides, among other things, as follows:

"It shall be the duty of any person or corporation, municipal or otherwise, to whom said execution shall be presented, and who shall at such time be indebted to the judgment debtor named in such execution, or who shall become indebted to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness, to pay over to the officer presenting the same, such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied, * * *."

We think that the word "indebtedness" as used in this section plainly refers to the several sorts of indebtedness upon which section 1 of the act declares the execution shall become a lien and a continuing levy, namely, "upon the wages, debts, earnings, salary, income from trust funds or profits due or to become due to said judgment debtor to the amount specified therein, which shall not exceed ten per centum unless the income of said debtor shall exceed the sum of one thousand dollars per annum, in which case the judge may order a larger percentage * * * ." We conclude, therefore, that the statute permits of an execution against the salary of a municipal officer. It is argued that such intention should not be attributed to the legislature because theretofore it had been the rule of public policy to keep out of the reach of creditors the unearned salary of a debtor for official service due to the public. *Spencer v. Morris*, 67 N. J. L. 500. No doubt, that policy was based upon the fact that the remuneration incident to a public office, as a rule, is essential to the decent and comfortable support of the incumbent. *Schwenk v. Wyckoff*, 46 N. J. Eq. 560. But the legislature seems to have

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given some consideration to that fact, for it will be observed that section 1 of the act limits the levy to ten per centum unless the salary exceeds \$1,000 per annum, and further provides that only one execution against the salary shall be satisfied at one time. But, however that may be, it is not the function of the court to consider whether this matter was wisely determined. That was a legislative question, and the suggestion that it was unwisely determined does not authorize us to withhold from the language of the law as it was passed by the legislature such import as it reasonably bears.

The foregoing are the only questions argued, and we have not considered any others.

The judgment of the court below will be reversed and a new trial awarded.

EDWARD F. BYRNE, RELATOR, v. THOMAS L. RAYMOND,
MAYOR, &c., RESPONDENT.

Submitted March 16, 1916—Decided June 8, 1916.

An appointment by the city clerk of Newark under *Pamph. L. 1907, p. 34*, "by and with the consent of the board of aldermen or common council," does not need the approval of the mayor to render it valid.

On rule to show cause for a *mandamus*.

Before Justices PARKER, MINTURN and KALISCH.

For the relator, *George W. Anderson*.

For the respondent, *Spaulding Fraser*.

The opinion of the court was delivered by

PARKER, J. The question relates to the validity of the appointment of relator as "assistant messenger" in the office

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of the city clerk of the city of Newark, and his right to draw salary in that capacity. The mayor refused to certify the pay warrant and this proceeding is brought to require him to do so. The case turns on whether or not the appointment and the designation of salary, made by the city clerk and concurred in by the common council, require the approval of the mayor as an element of validity.

The case shows the following proceedings as between the city clerk and the council:

"NEWARK, N. J., November 5th, 1915.

"*To the Honorable*

"*Common Council of the*

"*City of Newark, N. J.:*

"GENTLEMEN—Pursuant to law placing the appointment of attaches in the office of the city clerk with that official, I hereby appoint Edward F. Byrne as assistant messenger in the office of the city clerk at an annual salary of one thousand, two hundred dollars (\$1,200), payable in the same manner as other salaries are paid and to take effect November 15th, 1915, and respectfully ask your concurrence.

"Mr. Byrne has passed the necessary civil service examination and has been certified to the city clerk as one of three availables.

"This appointment is made in conformity with chapter 156 of the laws of 1908 and in accordance with rule 7 of the civil service commission of the State of New Jersey.

"Respectfully yours,

"(Sgd.) A. ARCHIBALD.

"Ald. Phillips moved that the communication be received and the action of the city clerk concurred in.

"Carried."

Relator entered on the performance of his duties and continued therein, but the mayor, whose signature to pay warrants is required by the ordinances, refused to sign the warrant for November, 1915, salary on the ground that the concurrence of the council was invalid without his approval.

The appointment was made under an act of 1907 (*Pamph. L.*, p. 34), which concededly applies and which reads as follows:

"It shall be lawful for the city clerk of any city of the first class of this state, by and with the consent of the board of aldermen or common council therein, to appoint such clerks and assistants in the office of such city clerk, and to increase or decrease the number thereof as the public business may require, and to fix the salaries of such clerks and assistants, and the board of finance or body having control of the finances of such city shall provide the moneys necessary to pay the salaries of such clerks and assistants."

The argument for respondent is that the "consent of the board of aldermen or common council" is, or necessarily implies, a resolution formal in character, and that all resolutions, by section 30 of the city charter, require the approval of the mayor. *Pamph. L.* 1857, pp. 116, 130. We had to deal with a somewhat similar question in *Hart v. Newark*, 80 N. J. L. 600, where the dismissal of a city employe by vote of a majority of the council was sustained although not approved by the mayor. This was under section 21 of the charter, and it is now argued that it does not apply because the phraseology of section 21, requiring the action of "a majority of the whole number of the members of the council" points out the sole limitation of the power. We consider, however, that the act of 1907 plainly intends the concurrence of no more than the city clerk and the council, and as by section 2 of said act all inconsistent legislation is expressly repealed, section 21 of the charter cannot prevail against it, if it has the meaning that we ascribe to it, viz., that the phrase "concurrence of the council" is the same sort of concurrence that is contemplated in case of an appointment by the mayor to some office or position within his gift.

There will be a peremptory writ, but if respondent wishes to preserve the right of appeal, application may be made to frame a suitable record based on alternative writ and judgment for relator.

**JAMES J. CONNORS, ADMINISTRATOR, &c., PETITIONER,
v. PUBLIC SERVICE ELECTRIC COMPANY, PROSE-
CUTOR.**

Submitted March 16, 1916—Decided June 8, 1916.

1. The provision of the Workmen's Compensation act with relation to weekly wages being taken to be six times the average daily earnings for a working day of ordinary length, excluding over-time, is confined to cases where the rate of wages is fixed by the output of the employe, and does not refer to cases where he received a fixed wage per day.
2. Where death results immediately from an accident, compensation under the Workmen's Compensation act should begin at the time of the death. The provision of section 13 of the act, providing that compensation shall not begin until two weeks after the accident, should be read in connection with section 14, and has no application to cases where deceased was killed instantly.
3. There is no provision in the Workmen's Compensation act authorizing the trial court to fix a specific day upon which the weekly compensation shall be paid. Where such a requirement would inconvenience the defendant an application for modification should be made to the trial court. Such a requirement is not sufficient ground for reversal.
4. Paragraph 19 of the Workmen's Compensation act provides that action under that act where death results from the injury shall be brought by the executor or administrator of deceased, or in case there is none, by such person as would be entitled to administration.
5. Paragraph 12 of the Workmen's Compensation act of 1911, relative to compensation to be paid to dependents in case of death, was amended by the act of 1913 (*Pamph. L.*, p. 302), and instead of specific percentages applied to specific groups of dependent relatives, substituted percentages based on the varying number of actual dependents within the degrees of consanguinity or limits of affinity set out in the act. Whether or not such persons are actual dependents is a question of fact.
6. Where an adult son gave all his money, which was more than the value of his board and lodging, to his mother for the common fund of the family, some of whom were themselves working—*Held*, that the family were deprived of the benefit of the wages of deceased by his death and all were actual dependents within the meaning of the act.

On certiorari.

Before Justices PARKER, MINTURN and KALISCH.

Conners v. Public Serv. Elec. Co.89 N. J. L.

For the prosecutor, *Leonard J. Tynan*.

For the petitioner, *Charles M. Egan*. •

The opinion of the court was delivered by

PARKER, J. This is a workmen's compensation case. The suit is brought for the benefit of the father, mother and sister of the deceased, all of whom claim to be dependents.

The first point made is that the court had no evidence before it to justify a finding that the wages of the deceased were \$11.94 a week. There was such evidence in the shape of a letter written by an authorized agent of the defendant company stating that fact. In addition to this, it appeared that the deceased had been taken on in one department at \$1.75 a day, and worked for six days a week in that department, and that he was afterwards transferred to another department where he worked seven days a week at the same rate of \$1.75, or \$12.25 a week, if he worked steadily. Counsel seems to rely on the provision in the statute with relation to weekly wages being taken to be six times the average daily earnings for a working day of ordinary length, excluding overtime, but this provision is confined to cases where the rate of wages is fixed by the output of the employe and does not refer to cases where he received a fixed wage per day.

The next point is, that there was error in the determination requiring the compensation to begin at the time of the death of the deceased, in view of the provision of section 13 of the act, that compensation shall not begin until two weeks after the injury. This section is to be read in connection with section 14, which relates to the furnishing of medical attention and medicines, and, in our judgment, is confined to cases where death does not occur. In the present case the deceased was killed instantly, and so the provision of holding up the compensation for two weeks has, as we think, no application.

The third point is, that there was error in providing that the weekly payments should be made on Saturday of each and every week, commencing with the 11th day of December.

We know of no provision in the statute which authorizes the court to require payments to be made upon a specific day of the week, but this question is comparatively unimportant. If it were made to appear that such a requirement gave inconvenience or trouble to the defendant, in view of its system of making payments, an application to the trial court would no doubt dispose of the difficulty. We do not think it requires at this time either a reversal or modification of the judgment below.

The fourth point raises the question whether the action was properly brought by the administrator of the deceased. As to this counsel relies on section 19 of the act, which provides that where no executor or administrator is qualified, the judge shall by order direct payment to be made to such person as would be appointed administrator of the estate of such deceased, &c. This provision of the act plainly contemplates the institution of the proceeding by the executor or administrator of the deceased, where there is an executor or administrator, and if there is none, by such person as would be entitled to administration. There is an administrator in the present case and plainly the suit was properly brought by him. See *McFarland v. Central Railroad Co.*, 84 N. J. L. 435.

The next point raises the question whether the father and mother and sister of the deceased were actual dependents in the sense intended by the statute. The trial court held that they were actual dependents, relying on the case of *Havey v. Erie Railroad Co.*, 87 N. J. L. 444, decided by this court. That case was governed by the act as it stood before the amendment of 1913; was reversed in the Court of Errors and Appeals (88 *Id.* 684), and differs on the facts. It is necessary, therefore, to examine these differences with care. In both the act of 1911 and in the amendment of 1913, paragraph 12 begins thus:

"In case of death, compensation shall be computed, but not distributed, on the following basis:

"(1) Actual dependents."

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 They proceed, respectively, thus:

(Act of 1911.)

"If orphan or orphans, a minimum of 25% * * *.

"If widow alone, 25%.

"If widow and one child, 40%," and so on.

(Amendment of 1913.)

"For one dependent, 35% of wages.

"For two dependents,

45% of wages," and so on.
* * *

"The term 'dependents' shall apply to and include any or all the following who are dependent on the deceased at the time of his death, namely, * * * parents * * * sisters * * * provided that dependency shall be presumed as to * * * children under the age of 18 years * * *."

The facts in the Havey case were that deceased was a minor, and so his father, the petitioner, was legally entitled to his wages and bound to furnish support; that there were several minor brothers and sisters, mostly of tender age. This court held that actual dependency was a question of fact, and, in applying paragraph 12 of the act of 1911, relied on the clause providing for "minor or incapacitated brothers and sisters." 87 N. J. L. 446. The reversal in the Court of Errors and Appeals went upon the ground, as we understand it, that the brothers and sisters were not legally dependent on deceased, because he was under no obligation to support them, and were not dependent on him in fact, because they were dependent upon the father who was entitled to use the wages of deceased to support them; so that the direct dependency was upon the father. "Benefit" and "dependence" said the court, "are not synonymous words," by which we understand that

benefit does not necessarily imply dependency, though it may be said to be an essential element of it.

The facts in the present case are quite different, as well as the statute. Instead of specific percentages applied to specific groups of dependent relatives, we have percentages based on the varying number of actual dependents within the degrees of consanguinity or limits of affinity set out in the act. In the case at bar, there is no question about the relationship, but only as to actual dependency. The clause of 1911, about minor brothers and sisters, is gone, so the question of minority *vel non* of the sister of deceased, who was working as a stenographer, and, as to whose age there seems to be no proof, is out of the case. There is a clause in the act of 1913 (at p. 306) relating to "orphans or other children," but this manifestly relates to children of the deceased and not to brothers or sisters.

As to the facts, we note that the deceased was over age, and therefore entitled to his own wages; that as a voluntary matter he turned his wages into the family fund; and there was evidence justifying a finding that the sister, whether an adult or a minor, received substantial benefit therefrom, of which she has been deprived since his death. This, in turn, justified a finding that she was an actual dependent. We do not understand the decision of the Court of Errors and Appeals in the Havey case to mean that a minor sister cannot be classed as a dependent of a deceased adult brother because she has a father who is under obligation to support her. Such a ruling would shut out the minor brothers and sisters in a case, for example, where the father was incapacitated and earned nothing, and the adult brother was the sole support of the family. So, also, if she was of age, her actual dependency is a pure question of fact, to be determined by the test laid down by the opinion of this court in the case of *Hammill v. Pennsylvania Railroad Co.*, 87 N. J. L. 388, adopted in the Court of Errors and Appeals, 88 *Id.* 717, viz.:

"We understand the phrases 'actual dependent' and 'who are dependent upon deceased,' as used in paragraph 13 of the act as amended, to mean relatives in some degree mentioned

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in that paragraph, who were being wholly or to a substantial degree supported by the deceased at the time of his death." We also went on to say that there was evidence justifying the finding of that fact by the trial court, and that is also the situation in this case. It is true that the father himself worked and made \$26.40 a week, and the mother and sister also worked. That does not alter the situation that the earnings of the deceased went to the general support of the family; and that the amount he contributed, as found by the court (and the finding was supported by evidence), was more than his board and lodging and other expenses amounted to. The father testified that deceased gave all his money every week to his mother, and that it was more than the cost of his keep, so that it was a legitimate inference that the family was deriving substantial benefit from the fact that he remained living there and voluntarily gave all his wages into the common fund.

The other points made are covered by what has just been said. The judgment will be affirmed.

CONSOLIDATED GAS AND GASOLINE ENGINE COMPANY,
APPELLEE, v. MICHAEL BLANDA, APPELLANT.

Argued February 15, 1916—Decided June 10, 1916.

Under section 149 of the District Court act as amended (*Pamph. L. 1913, p. 619*), a notice in writing to the clerk that the party demands a venire for a jury to try the cause on a specified date, which was the return day of the summons, is not operative as a general demand of a jury trial on any date whereon such trial is held.

On appeal from the District Court.

Before Justices PARKER, MINTURN and KALISCH.

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For the appellant, *Weinberger & Weinberger*.

The opinion of the court was delivered by

PARKER, J. This appeal is submitted on briefs, but we have the brief only of appellant. The question raised is whether the court below erred in refusing appellant, defendant, a jury trial. Appellant was entitled to such jury trial if a proper demand was made in due season. The record shows that the summons was returnable December 1st, and duly served; that demand for jury was made by defendant with deposit of jury fees on November 30th; on December 1st, the return day, there was an adjournment until December 8th, at which time trial was had without jury against defendant's objection.

The point argued in appellant's brief is that by section 149 of the District Court act, a demand for jury trial is in time if made at least two days before the time fixed for the trial, and that December 8th was "the time fixed for the trial." To this we agree. Formerly the demand was sufficient if made one day before the time fixed for the trial. *Pamph. L.* 1898, p. 613. This was altered to two days in 1903. *Pamph. L.*, p. 505. In 1905, a further act was passed relating mainly to landlord and tenant proceedings but entitled as a supplement to the District Court act (*Pamph. L.*, p. 493), the fourth section of which provided that in any proceedings had by virtue of the act to which it was a supplement, the court should try the case without jury unless demand was made at least one day before the return day of the summons. This section was treated as applicable to District Court proceedings generally, in several cases. *Walnut v. Newton*, 82 N. J. L. 290 and cases cited on page 291. The distinction between the phrases "return day of the summons" and "time fixed for the trial" is obvious. Still later, the legislature limited this section by amendment to landlord and tenant cases only, and revived section 149 as to other cases. *Pamph. L.* 1913, p. 618. That section accordingly controls, and we are clear that the phrase "day fixed for the trial" means the

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return day of the summons if trial be then had, or any later day to which the trial may be adjourned and on which it is actually held. So that appellant's demand for a jury was not out of time because of being made only one day before return of the summons, in view of the fact that the trial was adjourned to a later date at least two days subsequent to the demand.

This, however, does not help the appellant, because the demand was not of a jury trial generally, but was limited by its terms to a specific date, to wit, the return day of the summons, and this seems to be the reason for its rejection by the court. The transcript shows that on December 8th, when the case was moved, the following colloquy took place:

Mr. Weinberger—I move at this time, your honor, that we be given the privilege to try this case by a jury in view of the fact that we have conformed to section 149 of the District Court act which provides that a trial by jury may be had any time before the fixed trial day by giving two days' notice in writing to the clerk accompanied by the regular amount required by law for the empanelling of a jury. The notice was served and filed with the clerk. The notice was not filed by the clerk of our district court, but was left with him on the thirtieth day of November, 1915.

The Court—And that is the notice? (Designating a paper.)

Mr. Weinberger—Yes, sir.

The Court—Let the stenographer copy the notice into his record.

(The notice is as follows:)

"To Thomas M. Bustard, Clerk of the Passaic District Court:

"You will hereby take notice, that the undersigned attorneys of the defendant demand and you are hereby required to issue a venire of twelve men to hear the issue in the above entitled matter on Wednesday, the first day of December, nineteen hundred and fifteen.

"Dated, November 29th, 1915.

"WEINBERGER & WEINBERGER,

"Attorneys of Defendant."

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Mr. Weinberger—I would like to have it noted also on the record that this case was an adjourned case from the first day of December until to-day, the eighth.

The Court—The court denies your motion because you have not given the notice required by statute.

If the trial had been held on December 1st, it is manifest that the court would not have committed error in trying the case without jury, because the two days' notice had not been given. *Condon v. Royce*, 68 N. J. L. 222, is a case predicated on this section as it stood before 1898, but its reasoning is applicable. Now there is nothing in the record to show a demand for a jury at any stage of the case, except the notice to the clerk, and the request on December 8th. The latter was of course too late. The former, if sufficient as a demand at all, was by its express terms limited to a jury trial on December 1st and did not relate to any other date, so that in order to hold that the District Court committed legal error in refusing a jury on December 8th, it would be necessary to say that this notice, although invalid as a demand for a jury trial on December 1st, operated as a general demand of jury trial on any date to which such trial might be adjourned. We are unwilling to take that view. The normal and usual method of trial in a small cause court or District Court is without a jury. Either party is entitled to a jury, but he must ask for it, or, as held by a number of cases, his right is waived. Originally the procedure was perfectly simple and informal, viz., to state to the court either orally or in writing, that the party demands a jury. No written notice was required until the amendment of 1903, page 505. See *Gen. Stat.*, p. 1221, § 38; *Gen. Stat.*, p. 1251, pl. 198; *Gen. Stat.*, p. 1871, § 33; *Comp. Stat.*, p. 2992, § 33. By the act of 1905 the court was deprived of power to call a jury unless demand was made at least one day before the return of the summons, and this regulation was held constitutional. *Haythorn v. Van Keuren*, 79 N. J. L. 101. Then in 1913, as we have seen, the legislature went back to section 149, which requires a demand to be made, and notice thereof to be given

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to the clerk at least two days exclusive of Sundays and holidays, before the time fixed for the trial, and prepayment of fees; failing which, the demand shall be deemed to be waived. We find no such demand, but only notice of a demand (ineffective because out of time) that a venire issue to try the case on December 1st. The court was not required to treat this as applicable to any subsequent date, and in the absence of any repetition of it was entitled to regard the right to a jury trial as thereafter waived.

No other ground of appeal being urged, the judgment will be affirmed.

LONG DOCK COMPANY, PROSECUTOR, v. STATE BOARD
OF ASSESSORS ET AL.

Argued November 4, 1915—Decided June 10, 1916.

1. On a valuation of railroad property, brought before the Supreme Court, it was the duty of that court to examine the evidence and reverse the valuation of the state board in case of palpable error, hence, when that was done and the Supreme Court directed a reassessment, it was proper that further testimony on valuations should be taken.
2. In valuing property of a railroad company, including all of its terminal yard and water front, property adjoining its main stem, and land used for car storage and similar railroad purposes, it is proper to consider the increased value imparted to the several parcels by their assemblage into a connected whole appropriate to a railroad terminal.
3. Land under water, owned by a taxpayer, may be joined to the upland for assessment or segregated into separate tracts in the discretion of the assessors.
4. If a right to reclaim, not exercised, exists, it may be regarded as an increment of value to the shoreward property.
5. The element of adjacency or proximity or accessibility to tide-water may extend within reasonable limits, more or less indefinitely inland, as an element of value, as where questions of convenient storage are involved, the situation with regard to tide-water and accessibility then becomes important.
6. In valuing property of a railroad company, including all of its terminal yard and water-front property, other property adjoining

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its main stem and land used for car storage and similar railroad purposes, or other property similarly situated, may, for purposes of comparison, be considered by the assessors in arriving at a valuation thereof, it being impossible to secure identical conditions, and substantially similar conditions being all that is required.

7. In assessing such property, cost of reproduction is a proper element to consider.
8. The claim that the railroad franchise was included in the valuation of the board—*Held* not supported by the evidence.
9. In assessing property, including all the terminal yard and water-front property of a railroad, other property adjoining its main stem, and land used for car storage and similar railroad purposes, a rule of valuing railroad property where railroading was unprofitable at or below ordinary values, and where railroading is profitable at more than such ordinary values, is, if applied to all railroad property, a uniform rule under the constitutional requirement.
10. The fact that neighboring property is valued at less than true value does not entitle a railroad, whose property is assessed at its true value, to have its valuation lessened on account of the undervaluation of its neighbor's property.
11. In assessing property, including all of the terminal yard and water-front property of a railroad, the admission of evidence of the valuation of terminal properties of other railroads as a criterion, while irregular, was harmless, the finding being supported without that evidence.
12. Under the provision of section 13 of the Railroad Tax act, which provides that if it shall appear that any assessment is excessive or insufficient, the court may reduce it or increase it, or refer it back to the board of assessors, it is optional with the Supreme Court as a matter of judicial discretion to send back excessive valuations or to make such revaluations itself.
13. The extension of the pier line in the Hudson river in the year 1913 did not confer a title to the land under water between the old pier and new pier lines until it was reclaimed.
14. An increase of approximately seventy-five per cent. of the additional area valued as upland, for the mere privilege of reclaiming land under water—*Held* unreasonable.

On four writs of *certiorari* to review the reassessment of "second class" railroad property for the year 1911, and the assessment of the same property for the years 1912, 1913 and 1914, respectively.

Before Justices PARKER, MINTURN and KALISCH.

Long Dock Co. v. State Bd. of Assessors.89 N. J. L.

For the prosecutor, *Robert J. Bain* (*Gilbert Collins* and *George S. Hobart* on the brief).

For the defendants, *John R. Hardin*.

The opinion of the court was delivered by

PARKER, J. The assessments for all the years mentioned relate to precisely the same property with the exception of 1914. Generally speaking, the property includes all of the terminal yard and water front at Harsimus in Jersey City as used by the Erie Railroad Company, and other property adjoining the main stem in lower Jersey City, also at the west end of the tunnel and cut, and land used for car storage and similar railroad purposes on and adjoining the Hackensack meadows.

The valuation fixed by the state board for 1911 was brought before the Supreme Court on *certiorari* and was there affirmed. 85 N. J. L. 536. On review in the Court of Errors and Appeals it was reversed (86 *Id.* 593), and that court held distinctly that it was the duty of the Supreme Court to examine the evidence and reverse in case of "palpable error" appearing. The reversal in the Court of Errors and Appeals went on the ground that all the evidence appearing in the case showed a lower valuation, and that the state board were not entitled to use their "personal knowledge" of values as a basis of a finding while refusing to state or be examined and give testimony as to what that knowledge was and how they acquired it.

The case was remitted to the Supreme Court and that court then directed a reassessment with leave to take further testimony on valuations. When the matter was again opened before the board, prosecutor objected to further testimony, and now makes the point that it was inadmissible. So to hold would be to overrule the express direction of this court which appears to have been made in obedience to the plain intent of the opinion in the Court of Errors and Appeals and it would have been error if the assessors had excluded it.

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This point being settled, counsel have so arranged the evidence by various stipulations that we consider all four years on the same evidence, except that in 1914 there was an increase in water front valuations because of extension of the pier line by the war department, which must be dealt with separately.

There are certain legal points which may as well be dealt with first, so as to lay a foundation for consideration of the facts.

It is first asserted that the valuations generally were ascertained and fixed by the application of an arbitrary mutiple. This appeared to be a fact when the 1911 case was before the Court of Errors and Appeals. It is explained more or less satisfactorily now. Two of the commissioners, Messrs. Record and Hendrickson, took the stand as witnesses. Both swore and most credibly, to long study and experience in appraising this class of property. They qualified as "experts" in the legal sense because of this special study. There were three principal questions to be practically treated: (1) What was the value of the various parcels *per se* for average business or other purposes? (2) Did they have any greater value for railroad purposes irrespective of railroad franchise, and if so, how much? (3) In connection with (2), was any greater value imparted to them because assembled into a connected whole appropriate to a railroad terminal, and if so, what? Both Messrs. Record and Hendrickson, as their testimony seems to indicate, testified from experience to the increment of value due to assembling and availability for special use. It is now argued that such an element of value cannot be considered, and the United States Supreme Court case of *New York City v. Sage*, 36 U. S. 25, is relied on. But we agree with counsel for defendants that it is not on the point, for it is a condemnation case and relates to the value of an outside tract before assemblage, a very different thing from an integral part after assemblage. It is elementary that in combining two or more tracts of land for a purpose requiring both or all together, the value of the whole may well be more than the total of the parts separately. So Chief

Justice Beasley, in effect, said in *Central Railroad Co. v. State Board of Assessors*, 49 N. J. L. 1. If the mutiple is in fact arbitrary, of course it is presumably erroneous, but if the evidence indicates that it is based on a reasonable consideration of facts, it is not made arbitrary because it happens to be a mathematical constant. See *Wayne Township v. Laffin & Rand Co.*, 76 Id. 175.

Next it is insisted that the lands under water should have been joined to the upland for assessment and not segregated into separate tracts. The answer is that if the lands under water are owned by the taxpayer, either method is allowable and some discretion must be accorded to the board. *Jersey City v. Board*, 73 N. J. L. 164, 166; *S. C.*, 75 Id. 571; *Long Dock Co. v. Board*, 87 Id. 22. If it is owned land, whether under water or not, it is assessable as such; but if only a right to reclaim not exercised, it may be regarded as an increment of value to the shoreward property. *Ibid.* This will appear presently in connection with the extended pier line questions.

The next point is numbered IV., and is a complaint of double increment because both upland and riparian lands were valued as adjacent to tidewater. We fail to see why the element of adjacency or proximity or accessibility to tidewater may not extend within reasonable limits, more or less indefinitely inland as an element of value. Where questions of convenient storage and transportation are involved, situations with regard to tidewater and accessibility thereto become of great importance.

Point V. is covered by what has been said under the second point herein discussed.

Point VI. is, that the valuation is based in whole or part on the value of other lands not similarly situated. The practical complaint is that lands in the "business" section of Hoboken and Jersey City were considered. We fail to see why, for purposes of comparison, all the land in lower Jersey City and Hoboken, should not be considered. It is impossible to secure identical conditions. What is looked for is substantially similar conditions. There is at least enough similarity along

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this water front to justify a comparison of values. *Packard v. Bergen Neck Railway Co.*, 54 N. J. L. 553; *Manda v. Orange*, 82 Id. 686, 688.

VII. Cost of reproduction. That this is properly an element to consider we think needs no argument.

VIII. brings up the real point, viz., that the valuation fixed by the board is inseparably connected with the franchise. The board says in effect that it is not, and we think prosecutor has failed to show the contrary. This is a great terminal property opposite New York City, and which, while in fact connected with the Long Dock railroad, might be connected with any other railroad now operating from the Jersey side, or that might be organized so to operate. If the Erie Railroad Company should go out of business, it could be used for a terminal connecting with all the railroads terminating between Communipaw and Weehawken. Taken by itself it is a great unified tract with deep water in front and railroad communications behind. We think it is idle to argue, as do prosecutor's experts, that it is to be split into two, or three, or four or more zones, each to be valued separately. Every part of this main tract depends for its value in some measure on every other part. There are tracts of land elsewhere that are worth more when cut up into building lots, and there are also tracts worth more because assembled and peculiarly adaptable to business. This is one of the latter class.

Point IX. is, that the valuations were not made under a uniform rule, as required by the constitution. This is predicated on the testimony of Mr. Record, one of the board, that as a matter of practice they valued railroad property where railroading was unprofitable, at or below ordinary values of adjacent property, and where railroading is profitable, at more than such ordinary values. We are not at present concerned with the practical fairness of this method, but only with the uniformity of the rule. Manifestly, if applied to all railroad property, it is uniform, and we think it is quite conceivable that property affected by a railroad use is more valuable in some localities than in others. The test is, whether it is valued as railroad property and by uniform rules applicable

thereto. If the argument on this point is sound, the valuation of all railroad property in the state should be fixed by ascertaining its value for general purposes, and adding some fixed increment for railroad use; a proceeding which, on account of its arithmetical character, would undoubtedly result in much false valuation. This is not the uniformity contemplated by the constitution.

The tenth point is, that "The assessments were made at a rate in excess of the rate of assessment upon property of like character and similarly situated and were not in the same relative proportion of true value as that by which other property in the same taxing district was assessed, and said assessments are in excess of and disproportionate to the assessments placed upon the property of other owners in said taxing district and of owners of the same class of property contributing to the common burden of taxation." This point, when developed, amounts to this—that the railroads are assessed at what the board considered "true value" whereas private lands in the neighborhood were assessed at varying percentages less than true value. The argument is that the assessments on railroad land in Jersey City are, to use the language of the brief, "not in the same relative proportion of true value as that by which other property in the same taxing district was assessed." The inference is that if other property was undervalued, railroad property should also have been undervalued to the same extent. We know of no authority for this rule, and counsel cite none. On the contrary, the language of the constitution, of the statutes and of the cases has been uniform in reiterating the true value rule. It is true that local assessors often adopted in practice a sort of undervaluation rule, substantially uniform for a taxing district, and this while illegal would work no practical injustice if uniformly applied throughout the county and state, but it was not, and advantage was taken of it to evade the just apportionment of county and other taxes affecting more than one district. It was to remedy this that the county tax board legislation was adopted, which, among other things, provided for equalization of valuations as between in-

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dividuals and also taxing districts. *Pamph. L.* 1906, p. 210; *Comp. Stat.*, p. 5115 *et seq.* Valuation at true value was laid down by section 2 as the primary and fundamental duty of the board. The same rule is laid down in the Railroad Tax act. *Comp. Stat.*, p. 5264, pl. 447. If the legislature has provided no machinery enabling a railroad whose property is assessed at true value to compel the undervaluation of neighboring property to be raised to its true value, the proposition to lower the railroad value may appeal to a sense of fairness, but is not legally sound. *Central Railroad Co. v. Board*, 49 N. J. L. 19.

The eleventh point in the brief raises certain questions of evidence.

(a) The sale price of other lands in the neighborhood not similar as to conditions. This is covered by what has already been said under point VI.

(b) That the valuation of the Pennsylvania and Lackawanna terminals was admitted as a criterion. The fact that they were valued by the board was admissible as a basis for the qualifications of Messrs. Hendrickson and Record as witnesses. Assuming the irregularity of the amount of valuation as a criterion, it was something of which the board necessarily had personal knowledge. Their finding is fully supportable in this court, except as hereafter noted, without that evidence. We consider the error, if error there was, harmless.

(c) Evidence that Harrison Williams represented the Erie Railroad Company, identified for the purposes of this case with the Long Dock Company, prosecutor, and that he assented to the valuation of 1911. We do not find it necessary to consider this evidence either. Of course the fact was fully within the knowledge of the board. We incline to think that when Mr. Williams was more or less formally accredited to the board as an agent of prosecutor specially interested with the conduct of its real estate and taxation matters, he was at least held out as empowered to deal with those matters in such a way as to bind his principal, and that admissions by him in the course of negotiation and discussion, not made without prejudice, would be competent evidence. We have

ourselves not considered them in ascertaining whether there was palpable error in the findings of the board.

This brings us to the question of the sufficiency of the evidence to support the valuations of the respective parcels of land, which are discussed in detail under point I. of prosecutor's brief. Our duty in this regard is pointed out in section 13 of the Railroad Tax act of 1888, as expounded by the Court of Errors and Appeals in *Long Dock Co. v. State Board*, 86 N. J. L. 592, 594. It appears to be different from the duty existing under the act of 1884, as viewed by Chief Justice Beasley in the *Central Railroad Case*, 49 *Id.* (at pp. 3, 4). The requirement that "if it shall be made to appear that any assessment is * * * excessive or insufficient, the court shall correct the same * * * and reduce or increase it as may be just, or refer it back to the board of assessors," makes it optional with this court as a matter of judicial discretion to send back valuations deemed excessive for revaluation, or itself make such revaluation. The general inadvisability of this court resolving itself into a reviewing board of tax valuation is pointed out by Chief Justice Beasley in the *Central railroad case* last cited. But this litigation has been before the courts for several years and ought to be settled so far as an ascertainment of facts can settle it. Accordingly, we have examined the evidence bearing on the several parcels of land assessed, and finding that in some cases they are palpably excessive, have ourselves fixed what we deem a reasonable valuation in view of the principles above enunciated. We subjoin a list of the tracts and our findings on the valuations thereof imposed by the board. So far as the valuations of the board are herein held excessive, they will be reversed and revalued in our judgment according to the figures stated; otherwise the assessment will be affirmed.

There was an additional value placed by the board on the water front tracts for 1914 because of the extension of the pier line in the Hudson river in 1913. This did not confer a title to the land under water between the old and new pier lines, until the land is reclaimed. *Long Dock Co. v. Board*,

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supra. It was further held in that case, that the addition, if any, to the value of the upland should be taxed with the upland. The board undertook to add to the upland value what amounted to one dollar per square foot of the area included between the old and new pier lines. Whether any increase in the upland value is supportable on the evidence, we think is doubtful; but we are in no doubt that an increase approximately equal to seventy-five per cent. of the additional area valued as upland, for a mere privilege, is out of all reason, and as there is nothing before us as a proper basis for the valuation of the increment, if any, the amount of increase on this account will go back to the board. This results in a reversal of the 1914 tax on all water front properties affected, irrespective of the general revaluations placed by us on some of them, which form a basis for the 1914 value to which may be added the increment for pier line extension if any.

CHARLES A. MCCORMICK, RELATOR, v. THE CITY OF NEW
BRUNSWICK, RESPONDENT.

Submitted March 16, 1916—Decided June 8, 1916.

1. The writ of *mandamus* will ordinarily not be awarded when such award will create disorder or confusion, or injuriously affect the rights of third persons.
2. The questions raised in this case being such as should have been raised promptly by a writ of *certiorari* attacking a contract for a public improvement—*Held*, that *mandamus* to assess the expense of such improvement should be denied where it appeared that it would involve a determination as to the legality of the contract after the improvement was completed and the contract price paid.

On demurrer to return to an alternative writ of *mandamus*.

Before Justices PARKER, MINTURN and KALISCH.

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For the relator, *Theodore Strong*.

For the respondent, *Freeman Woodbridge*.

The opinion of the court was delivered by

PARKER, J. The writ calls upon the respondent to proceed according to the city charter to assess the costs and expenses of opening a new street specifically described, or to show cause to the contrary. The facts deducible from the writ and the return indicate that the land for the street was acquired and the street itself was actually opened in a manner that seems plainly irregular; but, notwithstanding this, we do not think the relator is entitled to this extraordinary remedy.

The relevant facts are, that in June, 1913, council passed an ordinance to open the street in question, and for that purpose to acquire the necessary land, and directing the committee on streets to negotiate with the owner for the same; and that the cost and expense of the improvement be assessed, collected and appropriated according to the provisions of the city charter. The ordinance was vetoed by the mayor, but passed over his veto, and the committee on streets proceeded to negotiate with the owner of the land, named Jelin, who owned the entire block through which the street was to run. The result of this negotiation was a written agreement between Jelin and the city, whereby Jelin undertook to convey the necessary land to the city by warranty deed free of encumbrance, and also to grade, sewer, pave and curb the roadway of the new street and lay sidewalks therein, all in a prescribed manner and subject to the approval of city officials; and in consideration thereof the city agreed to exempt his other land in the block from assessment for this improvement, and also to pay him the sum of \$4,500 in cash. This agreement was carried out, apparently without any attack by *certiorari* by the present relator or anyone else. Jelin conveyed the land and did the work; and the city paid the money, and included the item in the annual tax budget for 1914. It was paid some time in that year, presumably when the work was

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done, or substantially done, and the land conveyed. At the time of the return the street had been accepted and was in use as a public street.

The rule to show cause in this cause was argued or submitted at the June term, 1914. At some time prior to March of that year relator appears to have attempted to restrain the proceedings between the city and Jelin by an equity suit for injunction, but was unsuccessful, the Chancellor pointing out that the irregularity of procedure, if any, should be corrected in this court. *McCormick v. New Brunswick*, 83 N. J. Eq. 1.

In the situation that existed at the time of application for an injunction, the appropriate remedy of the relator, or of any other taxpayer, was by way of *certiorari*. The ordinance was not in question; but, after the ordinance, the council departed from the charter procedure and undertook, not simply to acquire the land by negotiation and deed, for that would have been lawful under the charter, but to combine with the purchase a scheme of contracting for the improvement and of paying for the whole partly by cash and partly by exemption from assessment, that flew in the very face of the charter, and, as it seems to us, rendered voidable the whole transaction. All that was needed was the timely interposition of some prosecutor having a proper *status*, with an application for a *certiorari*, and the contract and resolutions predicated thereon would in due course have been set aside. No such application appears to have been made; and because of the mistaken resort to an equity suit, and subsequent delay until the whole scheme had been carried out, the position of the city became impregnable to attack by *certiorari*.

We are clear that a peremptory writ of *mandamus* should not go, and for the reason that it would only introduce confusion into the situation. The city has paid \$4,500 and has a completely improved new street. The injury to relator as a taxpayer must be slight, if not infinitesimal. To issue the writ would involve a decision as if on *certiorari*, setting aside the contract between the city and Jelin as to the exemption feature, an examination and ascertainment of the various items involved in the scheme that was carried out and a re-

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adjustment of them in the form of assessments, award for land taken, and payment for work done. Not to mention the impracticability of such a proceeding, Mr. Jelin would be at least entitled to a hearing before it could be set on foot, and it may well be that he could satisfy the court that it necessarily involved the remaking of a contract for him that he would never have entered into voluntarily, and the taking of his property without compensation.

Mandamus may be denied where it will create disorder and confusion (26 *Cyc.* 146; *People v. Olsen*, 215 *Ill.* 620; 74 *N. E. Rep.* 785), or where the rights of third persons will be injuriously affected. 26 *Cyc.* 149; *In re Hart*, 159 *N. Y.* 278; 54 *N. E. Rep.* 44. We are quite unable to see how the questions involved could be determined in any action except one of *certiorari*, begun before the scheme had been pushed to completion, and in which Jelin as a party could be heard.

Upon the facts exhibited by this record there must be a judgment for the respondent.

ABRAHAM NEWMAN v. LAWRENCE H. SANDERS, EXECUTOR OF BARBARA ROSENBAUM, DECEASED.

Argued February 16, 1916—Decided June 8, 1916.

1. It is settled law in this state that an action for permissive waste will lie under the statute of waste. *Comp. Stat.*, p. 5789.
2. Although the statute of waste gives no right of relief against the personal representatives of the deceased committer of the waste, it is to be inferred that the legislature had in mind that act in enacting the act of 1855 (*Comp. Stat.*, p. 2260, § 5), relating to the survival of actions. Consequently, an action for waste either committed or suffered to be committed survives against the personal representatives of the deceased committer of the waste.

On motion to strike out complaint.

Before Justices PARKER, MINTURN and KALISCH.

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For the plaintiff, *Queen & Stout*.

For the defendant, *McDermott & Enright*.

The opinion of the court was delivered by

PARKER, J. This is a suit by the remainderman against the executor of a life tenant for permissive waste suffered by the life tenant during the running of the life estate. The motion is tantamount to a demurrer under the former practice.

The two grounds argued are—*first*, that the complaint is not definite, and *second*, that the action has abated by reason of the death of the life tenant and does not survive against the executor. We see nothing in the first ground. The indefiniteness objected to is simply that the complaint fails to state whether the action is brought as at common law, or upon the statute of waste. The courts notice public statutes *ex-officio* without their being pleaded. 1 *Chit. Pl.* 246. If therefore the complaint states a cause of action either at common law or by statute, it is not vulnerable to a demurrer.

This brings us to the second ground, which brings up the real point. It is urged, and correctly, that the statute of waste (*Comp. Stat.*, p. 5789) gives no right of relief against the personal representative of the deceased committer of the waste. There is a good deal of old learning upon the question whether an action will lie at all under the statute for permissive waste, but in this state this has been settled by the decision of Chief Justice Depue in the case of *Moore v. Townsend*, 33 N. J. L. 402, where he goes into the history of the decisions and holds that even under the statute of Marlbridge there was a remedy for permissive as well as for active waste, and then proceeds to call attention to the wording of our statute, which does not exactly copy the statute of Marlbridge, and if anything enlarges it. That statute is section 2 of the act concerning waste and dates from the time of Paterson (see *Pat. Rev.*, p. 179). The words used are "make or suffer any waste." This statute has been reenacted from time to time in our revisions and now appears in the *Comp. Stat.*, p. 5790. It is held in the opinion in the Townsend case

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that the action is an action on the case, and such is evidently the present action. It plainly lies against a living person. As to whether such an action survives against the personal representative of a deceased person, we should apply the reasoning of the opinion in the recent case of Hackensack Trust Company against Vandenberg in 88 N. J. L. 518. That was a case where the statute of 1848 gave a right of action for injury causing death, which right of action did not previously exist. We held there, that by reason of the fact that the act of 1855 (*Comp. Stat.*, p. 2260, § 5), relating to the survival of actions, came after the act of 1848, it was to be inferred that the legislature had that act in mind in passing the act of 1855 and meant the survival to apply to an action for injury causing death. The same principle applies to the statutory action of waste, and we consider that the Hackensack Trust Company case is authority for the proposition that section 2 of the Waste act, which gives an action generally for damages for waste either done or suffered created a cause of action that survives by reason of the Executors and Administrators act of 1855. We think, therefore, that the motion to strike out the complaint must fail.

WILLIAM RIDDLE, PROSECUTOR, v. CITY OF ATLANTIC
CITY, RESPONDENT.

Argued February 17, 1916—Decided June 6, 1916.

1. A city incorporated under *Pamph. L.* 1902, p. 284, has no power, after it has made a contract for the removal and disposal of garbage, to purchase a plant in aid of the contractor or to issue bonds to raise the money to pay therefor.
2. Such a contract must be let to the lowest responsible bidder, and where the invitation to bidders does not provide for it, a subsequent arrangement under which the city is to purchase a plant and machinery and turn over the machinery, without the cost, to the successful bidder, is giving an unfair advantage to one bidder over the others. In such case the contract, as changed,

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has not been awarded to the lowest bidder in any legal sense, and an ordinance which undertakes to make the purchase for such purpose is *ultra vires*.

On *certiorari*.

Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the prosecutor, *Lewis Starr*.

For the respondent, *Harry Wootton* and *Clarence L. Cole*.

The opinion of the court was delivered by

BERGEN, J. The writ of *certiorari* allowed in this case brings under review two ordinances passed by the commissioners of Atlantic City, one providing for the purchase of certain buildings and equipment "being used for municipal storage purposes, purposes incident to the disposal of waste materials in said city, and other like public purposes," at a cost not to exceed \$40,000, and the other providing for the issuing of bonds of the city of Atlantic City in an amount not exceeding \$40,000, for the purpose of obtaining money for the payment of the property directed to be purchased by the first ordinance. The ordinance directing the purchase was approved January 6th, 1916, and that authorizing the issuing of the bonds on January 27th, 1916. The prosecutor claims that the city has no legal authority to make the purchase provided for by the first ordinance, and, as a necessary sequence, that the issue of bonds for the purpose of raising money to pay the cost of such purchase was unauthorized.

The pertinent facts necessary to be considered in disposition of this cause are as follows: In 1911 a contract was made by the Atlantic Product Company with the city of Atlantic City by the terms of which the company agreed to collect and dispose of the garbage of the city for a term which expires August 31st, 1916. In carrying out its contract the company cremated the garbage at its plant located on land leased from the city, at Clam creek, within the city limits. In 1915,

some of the citizens of Atlantic City, conceiving that the disposal works as located were detrimental to the city, principally because of the escape of noxious odors, organized a corporation called the Farmers Supply and Product Company, for the purpose of obtaining a contract with the city for the disposal of garbage at some point beyond the city limits, intending to erect a disposal plant at Crab island, about eighteen miles from the city, and when bids were called for by the city for a contract for the collection and disposal of garbage after August 31st, 1916, the new company, being the lowest bidder, was awarded the contract, was duly executed November 19th, 1915, in terms requiring the disposal works to be located outside of the city, the term being five years, from September 1st, 1916. The proceedings up to this point are not assailed, because under this contract the city was not required to provide any part of the plant, and therefore no bond issue was necessary, but the dispute arises over what subsequently occurred. It appears from this record that the promoters of the new company, being to some extent persons interested in certain of the larger hotels of Atlantic City, desiring the removal of the disposal station to Crab island before the opening of the summer season of 1916, in order to abate the alleged nuisance during that period, undertook to acquire the plant of the Atlantic Product Company so that the disposal works might be removed to Crab island as early in the season as possible, and to take over the remainder of the term contracted for by the Atlantic Product Company, and, in order to accomplish this, the new company decided to buy the stock of the old company, or at least to have it in the hands of its friends, and a contract was made between the stockholders of the Atlantic Product Company and a representative of the new company, which provided for the purchase of this stock for \$40,000, and thereafter, and on the 8th of December, 1915, the Farmers Supply and Product Company submitted to the city a proposition in which it was represented that it had procured an option for the purchase from the Atlantic Product Company of their garbage plant in the city, at the price of \$40,000, and offering to sell the plant, consisting of

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buildings and machinery, to the city for the sum of \$40,000, retaining without rent so much of the machinery and appliances as it wished in the execution of its contract for five years, or of any renewal thereof, and it was the acceptance of this proposition which the ordinance of purchase manifested. It does not require a great amount of acumen to see that the purpose of this proceeding was to furnish to the new company the capital required to purchase the stock of the old company. The city owned the land, the buildings and machinery belonged to the old company, and there is nothing in this case which shows that the new company was simply purchasing the buildings and machinery for \$40,000; all that appears is, that they were to pay, not exceeding \$40,000, for the capital stock of the old company. What the city was purchasing was a building on its own land and some machinery, a part of which the new company, according to its proposition, expected to retain and remove to Crab island for the purpose of executing its contract, not only during the summer of 1916, until the old contract expired, but during the continuance of its own contract for five years, and all renewals thereof. The land and the buildings had been leased to the new company by the city, and there was no reason why the city should purchase this plant for the benefit of the new company, and its value, based upon the rental, which was \$200 a year, would hardly justify the expenditure of \$40,000, the interest upon which would greatly exceed the income which the city was to receive. Stripped of all subtlety the plain effect of the proposed purchase by the city was to furnish the Farmers Supply and Product Company with sufficient capital to buy the capital stock of the old company. It was sought by the form of the ordinance to conceal this purpose, but a court cannot shut its eyes and refuse to see the real purpose which this record discloses. Under the charter of Atlantic City (*Pamph. L. 1902, p. 284, subdivision 19 of section 14*) the city is authorized to adopt ordinances, among other things, "to provide for the collection and disposition of offal, garbage, wastes and all refuse matter which may become dangerous to the public health and to establish and empower the local board of health

established, or to be established, in such city, to make collection and disposition thereof or to provide therefor, and in case such board is given such power and authority, it is hereby authorized to accept the same, and given power to collect and dispose of all such refuse matter." This act must be construed in connection with another (*Pamph. L.* 1902, p. 200), which authorizes the making of contracts to remove garbage for a term not exceeding five years (*Townsend v. Atlantic City*, 72 N. J. L. 474), but neither statute authorizes the use of the credit of the city for the benefit of a private corporation, nor does either in express terms authorize the issuing of bonds for the purchase of lands for the purpose of cremating garbage, such purpose not being within the authority found in section 104 of the act of 1902, "for the removal and disposition of the sewage thereof." Nor do we think the act of 1895 (*Pamph. L.*, p. 101) authorizes the present issue of bonds. The first section of that act provides that when it shall be necessary to cremate garbage it shall be lawful for the common council or other governing body to purchase, in the name of the city, all necessary lands and real estate, and to erect thereon a building or buildings and equip the same with all necessary appliances. This section applies only when the city is itself carrying on the business. Section 3 provides that where it is more advantageous for the city to have the garbage cremated by persons other than the city, "and at crematories not owned by the municipal corporation," it shall be lawful to provide for such cremation by contract and to raise annually the sum needed to defray expense. This does not authorize the purchase of a plant nor the issue of bonds to pay therefor. The second section of the act of 1895 provides for the issue of bonds where the city is itself cremating, but we can find no authority in the statute which authorizes a city, after it has made a contract, at a price agreed upon for the removal and disposal of its garbage, to purchase property in aid of the contractor and lease it to him for a nominal sum. The bid was made without reference to any such concession, and it would be manifestly

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unfair to all other bidders, for, if this be permissible, the city could, after it had made its contract, without reference to any such condition, purchase Crab island and then lease it to a favorite contractor for a nominal sum. The act of 1902 (*Pamph. L.*, p. 200) requires that such contracts shall only be made with the lowest responsible bidder, and if after the bid is awarded to the lowest responsible bidder, the city can subsequently expend \$40,000 for the benefit of such bidder, without affording all other bidders a like opportunity, then the person to whom the contract is awarded is not the lowest bidder in a legal sense. We think these ordinances are *ultra vires* and ought to be set aside for two reasons—*first*, because the purchase was a mere subterfuge to furnish capital to the Farmers Supply and Product Company, and *second*, because to permit them to stand would be giving the supposed lowest bidder an advantage not accorded to other bidders and amounts, in substance, to the making of another contract not advertised as required by law because the effect is to increase the price paid beyond that which was bid and upon which the contract was based.

The ordinances will be set aside, with costs.

THE STATE, DEFENDANT IN ERROR, v. JOSEPH SERRITELLA, PLAINTIFF IN ERROR.

Submitted March 16, 1916—Decided June 6, 1916.

Section 70a of the act entitled "An act for the punishment of crimes (Revision, 1898)," (*Comp. Stat.*, p. 1769), declares it to be a misdemeanor to purchase certain articles therein described from any minor under the age of sixteen years which may have been stolen. *Held*, that in the prosecution of a defendant under this statute, it is not necessary to prove that the purchaser knew that the goods had been stolen. It is sufficient if it appears that the goods were purchased from a minor under the age of sixteen years, and that they were stolen.

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Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the plaintiff in error, *McDermitt & McDermitt*.

For the defendant in error, *Frederick F. Guild*.

The opinion of the court was delivered by

BERGEN, J. The defendant was convicted under an indictment charging him with buying and purchasing from three boys, "minors under the age of sixteen years, certain scrap lead and junk of a metallic nature, which had theretofore been stolen." Section 70a of the statute entitled "An act for the punishment of crimes (Revision, 1898)," (*Comp. Stat.*, p. 1769), declares that any person who shall buy or purchase, among other things stated, any jewelry, hardware, waste metals, plumbers' or builders' supplies or fixtures, metal pipes or conduits, and junk of a metallic nature, from any minor under the age of sixteen years, which may have been stolen, shall be guilty of a misdemeanor. This judgment of conviction the defendant seeks to review by a writ of error, and has procured the certificate of the trial judge that the record presented is the entire record of the proceedings had upon the trial of the indictment, as permitted by section 136 of the act relating to criminal procedure. *Comp. Stat.*, p. 1863. This record shows that two or three boys, admittedly under the age of sixteen years, stole certain lead pipe from an unoccupied house and carried it to the defendant who bought the lead from these boys. One of the boys who was with the other two when the lead was sold to the defendant, but who did not participate in the stealing, testified that he went with the two boys to the place of business of the defendant but did not enter the yard where the sale was made, although he saw that the lead was being weighed and that when the boys returned they had no lead, but they had money, "eighty-nine cents, I think." On cross-examination this witness testifies as follows:

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"Q. How much money did they give you out of the eighty-nine cents?

"A. They didn't give me nothing.

"Q. Why?

"A. They took the lead themselves; I didn't take it.

"Q. You knew that they took it, did you?

"A. I met them.

"Q. You know that they had taken the lead?

"A. I met them on Nassau street and they said they took it on Orange place."

Counsel for the defendant then asked the court to strike out "That they took it on Orange place." To this an exception was sealed, but when the court instructed the jury he read this part of the testimony to them and then instructed the jury that he would strike out so much of the answer as read "On Orange place," and that the jury should not consider the words stricken out, so that the answer would read, "I met them on Nassau street and they said they took it." The error alleged is, that this answer should have been stricken out entirely because it was not responsive. We do not take this view. This question was put by counsel for the defendant on cross-examination and the evident purpose of the examination was to affect the credibility of the witness by showing that he knew that the lead was stolen. "The question was, you knew that they had taken the lead," and the answer disclosed all the knowledge the witness had on that subject, that is, that he met the boys with the lead and they told him that they had taken it on Orange place. There was no error in this ruling.

The next point is, that the court erroneously stated to the jury "that Deprasto had testified that the other boys were with him." The error urged is, that the court did not make any distinction between the different occasions when the sales were made to the defendant. This objection seems to be without any merit because Deprasto had testified that at the time the lead was sold for eighty-five cents, the occasion upon which the state elected to rest its case, the others boys were with him.

The next point is, that the court erroneously charged the jury "That Deprasto was corroborated by one of the other boys." The other boy was the witness who testified that he saw Deprasto and another boy go into defendant's yard with this lead and that he saw it weighed and met the boys after they came out, and that they had eighty-nine cents. But the point of the argument is, that Deprasto testified that he got eighty-five cents, and that the corroborating witness testified that it was eighty-nine cents, and also that Deprasto said they carried it there in sacks, and the other witness said that they carried it in dish-pans. That Deprasto was corroborated by this witness to the extent that the lead was carried by the two boys to the defendant and purchased by him is perfectly clear, and it is unimportant whether the amount they received was eighty-five cents or eighty-nine cents or whether the lead was in dish-pans or sacks, for the controlling matter is, that this defendant purchased from the two boys, both under sixteen years of age, lead which it afterwards turned out was stolen, and that the corroborating witness saw the lead purchased by the defendant.

The next point urged is, that the court improperly charged the jury that a witness by the name of Miller had testified that the property from which the lead had been stolen, on Orange place, was entered in the month of May. This witness did so testify, although an inference might be drawn from his testimony that the house had been entered at other times, nevertheless he did say that it had been entered in May, and this was about the time that the goods were sold to the defendant.

The next point is, that the court erroneously instructed the jury that the boys stole the pipe. The answer to this is that Deprasto himself testified to that fact and there is no evidence to the contrary.

The next point is, that it was error to instruct the jury that the only dispute in the case was the fact of the sale to the defendant. What the court said was, "That they sold the pipe to the defendant is the only element of the case that is in dispute. There is no contention on the part of the de-

defendant that it was not stolen, but he says he did not buy it; he says that he never even saw these boys." The statute provides that any person who shall buy or purchase, among other things, metal pipe or junk of metallic nature, from any minor under the age of sixteen years, which may have been stolen, shall be guilty of a misdemeanor. Under this statute it is not necessary to show that the purchaser knew the goods to have been stolen. It is sufficient if the purchase be made of a person under the age of sixteen years, and that the goods were stolen. In this case it was shown that the junk purchased was stolen and that the purchase was made from a minor under the age of sixteen years. These two facts were not disputed. The only question in dispute was whether the defendant made the purchase. The witnesses for the state testified that he did, and the defendant, testifying on his own behalf, not only denied the purchase, but said that he had never seen these boys, and therefore the court was quite correct in saying that the only matter in dispute related to the purchase of the goods.

The next point made is, that it was error to charge that the date that the purchase was made was not material. We think the charge should be read in view of the facts developed in the case, and that was, that while the precise day in the month of May was not fixed, there was evidence that it did occur in the month of May, 1915, which we think was sufficient.

The next point made is, that it was error to charge that under this statute the state was not bound to prove that the defendant knew the goods were stolen. That this instruction properly interpreted the statute we have above indicated.

The only other point raised is, that the trial court in charging the jury commented upon the importance of the case to the community, and in explaining why it was important said, that purchases of this character often led young boys astray, and that if it were not for people who bought such goods from children, they could not dispose of them, and therefore the temptation to steal would be removed. He also told the jury that they should consider the importance of the

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matter to the defendant; that it was a very serious thing to be accused of a crime and to be compelled to answer an accusation of such a character as the one under consideration, and that he was presumed to be innocent in the eyes of the law until he was proven guilty. We see no legal error in the matter last complained of. It is quite a common thing for the court in charging the jury in criminal cases to impress upon them the importance of a just conclusion of the matter in dispute, important to the community for the purpose of preventing crime, important to the defendant because of the consequences which the law imposes if he should be found guilty.

We find no error in this record, and the judgment is affirmed.

CHARLES C. BROKAW, RELATOR, v. WILLIAM F. BURK
ET AL.

CHARLES W. DISBROW, RELATOR, v. WILLIAM F. BURK
ET AL.

HARRY JOHNSTON, RELATOR, v. WILLIAM F. BURK ET AL.

Submitted March 16, 1916—Decided June 20, 1916.

1. The recognized legal method of testing the legality or propriety of the actions of the civil service commission in refusing to certify a pay-roll is by *mandamus* and not by *certiorari*.
2. Prosecutors were lawfully in the employ of the city as employees in the sterilization plant. When the sterilization plant was discontinued they were transferred to similar work at the filtration plant. They were afterwards removed from their position because of a ruling of the civil service commission. *Held*, that while the city commission had the power to transfer them to similar work in another place, or to abolish their position, subject to their right to have their names on a special list for reinstatement within two years, yet under the act of 1913, paragraph 4, section 4 (*Pamph. L., p. 836*), they could be removed only for cause, after a hearing.

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On writs of *certiorari* in three cases, removing resolution of commissioners of Trenton removing prosecutors from their employment.

Before Justices PARKER, MINTURN and KALISCH.

For the prosecutors, *Charles E. Bird*.

For the city of Trenton, *Henry M. Hartman*.

For the civil service commission, *Herbert Boggs*, assistant attorney-general.

The opinion of the court was delivered by

MINTURN, J. These are three cases upon *certiorari* against the commissioners of the city of Trenton, involving the legality of a resolution dismissing the prosecutors, Brokaw, Disbrow and Johnston, from their positions as employes of that city, and also bringing up a "ruling" of the civil service commission with respect to the pay of prosecutors, in view of which ruling the resolution of dismissal was adopted. The three cases involve the same questions and can be disposed of together.

The Walsh act was adopted in Trenton June 20th, 1911. In December following the people of that city adopted the Civil Service act. The former act was approved April 25th, 1911, and the latter act April 10th, 1908. The civil service commission thereafter classified all the positions and offices in the city, among them the employes at the sterilization plant, who were designated as the "Labor Class."

Thereafter the director of the city commissioners, in charge of this plant, appointed the prosecutors, whose names were taken from the list prepared at the instance of the civil service commission.

The prosecutors continued to serve in their positions at the sterilization plant until the city completed its filtration plant, in October, 1914, when the prosecutors were placed at work upon it. Meanwhile, the civil service commission, on Sep-

tember 1st, 1914, had designated the employes upon the filtration plant as "Filtration Attendants," and placed them in the competitive class, and conducted an examination to fill the positions.

The city commissioners thereafter met with the civil service commissioners and attempted a solution of their difficulties, with the result that the prosecutors were retained by the city commissioners, and their names were regularly certified upon the payroll of the water department to the civil service commission, which body in turn certified the list to the city comptroller for payment until November, 1915, when the civil service commission refused longer to certify. Thereafter the civil service commission notified the director in charge of the works that the positions held by the prosecutors must be filled from the eligible list of "Filtration Attendants." This is the "ruling" brought up by the writ.

The prosecutors were then required, by resolution, to appear before the city commission and show cause why they should not be removed because of the civil service commission's ruling. The prosecutors, in writing, denied the power of the city commission to remove them upon the ground stated, and insisted they could be removed only for misconduct or delinquency.

The city commission thereafter, by resolution, dismissed them, and the writ brings that resolution also before us for review.

The Walsh act (*Pamph. L.* 1913, p. 836. ¶ 4, § 4) empowers the city commission to remove employes for cause, after a public hearing, in accordance with the Civil Service and Tenure of Office acts, where such acts have been adopted. We are not concerned with the legality or propriety of the action of the civil service commission in refusing to certify the payroll, since the recognized legal method of testing that posture of affairs is by *mandamus*, and not *certiorari*. As to the civil service commission, therefore, the present writs will be dismissed.

We are concerned only with the dismissal of the prosecutors, by the city commission, under the circumstances, and

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it is manifest, under the express provisions of the act of 1913, page 836, paragraph 4, section 4, that the prosecutors could be removed "for cause only after a public hearing." "Cause," meaning in this instance, just cause. *Haight v. Love*, 39 N. J. L. 14.

At the time of the adoption of the Civil Service act these prosecutors were lawfully in the employ of the city, and, when the sterilization plant was discontinued, it was within the power of the city commissioners to transfer them to similar employment at another place, with the approval of the commission (*Comp. Stat.*, p. 3803, § 23), or, in the discretion of the city commission, their positions could be abolished, which would entitle them under the act to have their names placed on a special list for reinstatement within two years to any similar position. *Comp. Stat.*, p. 3804, § 23.

It is unnecessary to determine the legal *status* of the prosecutors under the provisions of the Civil Service act. It must suffice to state that they were legally appointed as city employes, and that while the city commission had the power to transfer them to similar work in another place, or to abolish their positions, subject to the above provisions, yet, under the act of 1913, paragraph 4, section 4, they could be removed only for cause, after a hearing, which right was not accorded them in this instance.

The resolution before us will therefore be set aside.

KATHERINE FERBER v. PASQUALE CONA.

Argued November 3, 1915—Decided May 31, 1916.

1. Where a contract required the contractor to erect a garage of specified dimensions, in a suit for damages for failure to perform, it was competent for him to show that he was at all times willing to perform, but that the plaintiff made it impossible by requiring the contractor to build a garage essentially different from the requirements of the contract. *Held*, that the exclusion of such testimony by the trial court was erroneous.

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2. Where the owner prevents the contractor from performing, or repudiates his obligations under the contract, communicating such repudiation to the contractor, the latter may treat the contract as abandoned, and thus excuse his non-performance.

On appeal from the North Hudson District Court.

Before Justices PARKER, MINTURN and KALISCH.

For the appellant, *McDermott & Enright*.

For the defendant, *John N. Plattoff*.

The opinion of the court was delivered by

MINTURN, J. The suit was based upon a written contract, under the terms of which the defendant was to build a garage of certain dimensions, upon a lot which he sold to the plaintiff, and for which lot, including the building of the garage, the plaintiff paid to defendant the full consideration agreed upon. For almost two years the garage remained unbuilt, and the plaintiff, alleging frequent requests to the defendant to perform, and defendant's failure to comply, instituted this suit to recover damages for non-performance.

The defendant insists that he was at all times willing to perform, but that the plaintiff insisted upon the construction of a building of different character, and of larger dimensions than that required by the contract, to which the defendant refused to accede.

This issue presented the material controversy in the case, and to it the parties directed their proof at the trial.

In this situation it was competent for the defendant to prove his willingness to perform, and the refusal of the owner to allow him to do so, excepting under new conditions not contemplated by the contract, and at variance with its provisions.

With this purpose in view the plaintiff was asked upon cross-examination whether the defendant had not frequently expressed himself as willing to erect the garage of the dimensions called for in the contract. The overruling by the

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trial court of these inquiries, presents the substantial basis for this appeal.

We think the inquiry was entirely relevant to the issue, and bore upon the gravamen of the controversy between the parties.

It was tantamount if proved to an abandonment of the contract, by the plaintiff, and relieved the defendant from any attempt at further performance.

The rule is well settled that where one of the parties to a contract prevents performance by the other, or repudiates his obligations under the contract, and communicates such repudiation to the other party, the latter is excused from further performance and may treat the contract as abandoned. *Hochster v. Dela Tour*, 2 El. & B. 678; *O'Neill v. Supreme Council*, 70 N. J. L. 410; *Holt v. Trust Co.*, 74 Id. 795; *Wallis v. Wenham*, 204 Mass. 83; 17 Am. & Eng. Ann. Cas. 644; *Samel v. Super*, 85 N. J. L. 101; *Brady v. Oliver*, 125 Tenn. 595; Am. & Eng. Ann. Cas. (1913) 376.

The result is that the exclusion of this testimony requires a reversal of the judgment.

LILLIAN C. GOWDY v. THE BOARD OF EDUCATION OF
THE CITY OF PATERSON.

MAUDE F. HOMER v. THE BOARD OF EDUCATION OF THE
CITY OF PATERSON.

Argued February 16, 1916—Decided June 12, 1916.

Where the legal right of school teachers to have their salaries has been determined by judgment, the duty of the school board to levy the tax to pay the judgment becomes imperative, and *mandamus* will go against the representatives and agents of the school district to compel them to perform such duty, its power to raise the necessary funds being ample under *Comp. Stat.*, p. 4742, § 55.

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On return to alternative writ of *mandamus*.

Before Justices PARKER, MINTURN and KALISCH.

For the prosecutors, *Michael Dunn*.

For the defendant, *Francis Scott and Edward F. Merrey*.

The opinion of the court was delivered by

MINTURN, J. The right of these relators to their salaries having been determined by this court (*Gowdy v. State Board of Education*, 84 N. J. L. 231); in the manner therein adjudicated, their legal right to payment in accordance with that judgment is incontestable upon this hearing.

In such a situation, the duty of the school board to levy the tax to pay the judgment, or to perform such other duty as may be necessary to discharge the obligation becomes imperative and *mandamus* will go against the representatives and agents of the school district to compel them to perform such duty. *High Extr. L. Rem.* 301; *Pleasantville v. Atlantic City Co.*, 75 N. J. L. 279.

It is not a question of *ultra vires* with this defendant. Its power to raise the necessary funds is ample under the statute. *Comp. Stat.*, p. 4742, § 55.

It is also manifest that the defendant will not be in any-wise inconvenienced to the public detriment, in the performance of this legal obligation at the present time. If such a fact were apparent, it is clear that the issuance and return of the writ can be so regulated as to obviate the public inconvenience. *Hopper v. Freeholders*, 52 N. J. L. 313, 317.

The writ of peremptory *mandamus* will issue.

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DENNIS F. COLLINS, RELATOR, v. JOHN S. SAUER,
RESPONDENT.

Argued February 17, 1916—Decided June 6th, 1916.

1. Where the proviso of an act is separable from the remainder of the act and such proviso is unconstitutional, the proviso may be excised and the rest of the act allowed to stand.
2. A classification of cities on a basis of population is not in contravention of article 4, section 7, paragraph 11 of the constitution of New Jersey.
3. When a meeting of a municipal body is regularly held for the purpose of filling an appointment to an office, the term of the incumbent of which has expired, and no decision is reached at such meeting but an adjournment is had, the adjourned meeting is a continuation of the first, and the election held at such meeting is as of the date of the first meeting.

On *quo warranto* on demurrer to information.

Before Justices PARKER, MINTURN and KALISCH.

For the relator, *John J. Stamler, Frederick J. Faulks and Samuel Koestler.*

For the respondent, *John K. English and William D. Edwards.*

The opinion of the court was delivered by

KALISCH, J. The relator filed an information in the nature of a *quo warranto* claiming title to the office of city comptroller of the city of Elizabeth, by virtue of an election by the city council of Elizabeth, on the 5th day of January, 1916, for which office he duly qualified, and charging that John Sauer, the respondent, who was elected city comptroller of the city of Elizabeth by the city council of that city on the 1st day of January, 1910, and re-elected to the same office by the city council for the term of three years, on the 1st day of January, 1913, and whose term of office expired on the 1st

day of January, 1916, and continued until the relator qualified for the same, absolutely refused to surrender the office to the relator and was an intruder in and a usurper of the office to which the relator was lawfully elected. To this information the respondent filed a demurrer. The demurrer is based upon three grounds, two of which directly attack the title *de jure* of the relator to the office of city comptroller, and the other challenges the right of the common council to remove the respondent under the Tenure of Office act of 1911.

The argument made for the respondent assailing the claim of title of the relator to the office of city comptroller is builded upon the assertion that the city council had no legal power to elect a city comptroller, because, under section 2 of a supplement to the charter of the city of Elizabeth (*Pamph. L.* 1872, p. 1192), the mayor of the city was empowered to appoint a comptroller, with the advice and consent of the council, for the term of three years, from the 1st day of January next preceding his appointment, and that the act of 1894 (*Pamph. L.*, p. 244), which conferred on the common council, board of aldermen or the government body of the city the power to appoint a city comptroller, and the several acts of 1900 (*Pamph. L.*, p. 415) and 1911 (*Pamph. L.*, ch. 315, p. 679) amendatory of and supplemental to the act of 1894, are unconstitutional. The general grounds upon which council for respondent base their contention that these acts are unconstitutional is, that they are in contravention of article 4, section 7, paragraph 11 of the constitution of New Jersey, and that the classification upon a population basis, adopted by the legislature, does not cure their constitutional defects, because the classification is illusory.

The precise point urged by counsel for respondent as to the constitutional defect existing in the act of 1894, is that it excepts from the operation of the act the treasurer of a city within the legislative classification, where that officer is elected by the people.

The act of 1894 was unsuccessfully attacked as to illusory classification in *Varney v. Kramer*, 62 N. J. L. 483.

In *Attorney-General v. McKelvey*, 78 N. J. L. 621, the Court of Errors and Appeals, speaking through Mr. Justice Swayze (on p. 626), approves of *Varney v. Kramer*, *supra*, and (on pp. 627, 628) says: "Where the governmental apparatus alone is the subject of legislation, population, ordinarily, so fully connotes all the essential considerations that the general subject is, in the absence of palpable evasion, a question for legislative judgment."

The case of *Varney v. Kramer*, *supra*, was a contest involving a city clerkship. The reported case fails to show whether or not the point made now, that the proviso in the act of 1894, excluding the treasurers of cities, who, by the charters of such cities, are elected by popular vote, from the operation of the act, renders the act unconstitutional, was made in that case.

But, even if we were to adopt the view of counsel for respondent that the act was vulnerable to an attack upon it on the ground that it was in violation of the constitutional provision invoked in this case, because of the nature of the proviso relating to the treasurers of cities, it would not have the effect to vitiate the entire act. The proviso is separable from the rest of the act. The proviso may be excised and the rest of the act be permitted to stand. *Johnson v. State*, 59 N. J. L. 535; *Doran v. Camden*, 64 Id. 666; *Meehan v. Excise Commissioners*, 75 Id. 557; *Fagan v. Payne*, Id. 851; *State v. Davis*, 72 Id. 345; *Hutches v. Hohokus*, 82 Id. 140.

Now, what has been said regarding the act of 1894 and its proviso applies equally as well to the act of 1900 and its proviso. The act of 1900 extended the application of the act of 1894 to cities which were not within the classification scheme of that act by including cities which had a population not less than fifty thousand nor more than one hundred and twenty-five thousand inhabitants, and by extending the provisions of the act to additional appointive officials and by making the term of office three years instead of two. The act also amended the proviso of the act of 1894 relating to the city treasurer by excluding from the operation of the act the receiver of taxes and assessments of any city coming

within the classification. As to the act of 1911, chapter 315, the only change effected by it was to raise the minimum of population fixed in the act of 1900 at fifty thousand to fifty-five thousand inhabitants. This left the minimum as fixed originally by the act of 1894.

The act of 1894 having been upheld as constitutional and nothing appearing in the acts of 1900 and 1911 which in any manner changes the legislative scheme of the acts of 1894, the attack made by the respondent upon the constitutionality of the acts of 1900 and 1901 necessarily fails.

It is plain that the general scheme of all these acts is to bring about in municipalities of a certain grade of population uniformity in the government of them and as to how and by whom the officers of their various governmental departments shall be selected. And when legislation is of that general character it cannot be successfully denounced as special legislation regulating the internal affairs of cities. This appears to be the reasoning of Mr. Justice Trenchard in *McCarthy v. Queen*, 76 N. J. L. 144; affirmed by the Court of Errors and Appeals (at p. 828). See, also, *Attorney-General v. McKelvey*, *supra*.

Another ground upon which the respondent rests his demurrer is, that the act requires that the election of a comptroller shall take place at a regular meeting of the common council before the expiration of the preceding term of the comptroller, and since the relator was not elected by the common council until January 5th, 1916, and his predecessor's term had expired under the act on January 1st, 1916, the action of the common council in that regard was unlawful, and hence the relator's title to the office of comptroller invalid.

There appears to be no merit whatever in this contention. Counsel for the respondent assumes that the term of Sauer expired before the relator was elected, and that the act required that an election be held by the common council at a regular meeting before the expiration of such term. It appears that the common council held a meeting on the 1st day of January, 1916, and tried to elect a comptroller, and,

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after taking thirty-two ballots without reaching any result, adjourned the meeting to January 5th, when the relator was elected.

Section 4 of the act of 1905, page 15, makes all appointive offices commence on the 1st day of January of the year, but not at noon, as in case of officers elected by the people. The proviso of section 4 expressly forbids the appointment to office to be made by the governing body to commence after the expiration of the term of any member of such governing body, so that it is clear that the appointment in the present case could only be properly made by the incoming council which organized on the evening of the 1st day of January, 1916, and endeavored to make the appointment, and, not succeeding, adjourned the meeting until January 5th, 1916, which meeting, under *Stiles v. City of Lambertville*, 73 N. J. L. 90, was a continuation of the regular meeting, and at which session the common council was authorized to do anything that it could have done at the original meeting.

Counsel for respondent further rely on the act of 1911 (*Pamph. L.*, p. 679) to sustain the argument advanced, that it is obligatory, under that statute, on the common council, at a regular meeting preceding the expiration of the term of office of the incumbent, to make the appointment of such incumbent's successor, but that does not appear to be the plain purport of the act, for it expressly reserves the right to the governing bodies of such municipalities to make such appointments at the time prescribed by their respective charters; and it further provides "that the term of service of every such officer hereinbefore named holding office in any such city shall end on the appointment and qualification of their successors."

By the charter of the city of Elizabeth, and the several general laws applicable to such municipality, the officers elected and appointed in such city hold office until their successors are chosen and qualify. *Pamph. L.* 1863, p. 109; *Pamph. L.* 1872, p. 1192; *Pamph. L.* 1901, p. 43; *Pamph. L.* 1905, p. 680.

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Both in legal theory and in fact the term of office of the comptroller did not expire until the relator had been elected and qualified.

What was done by the common council at its regular meeting when it elected the relator comptroller was, in fact, done preceding the expiration of the legal term of the incumbent as contemplated by the statute.

Lastly, it is urged that the respondent is the incumbent of an office from which he cannot be lawfully removed, except for just cause and after a public hearing under the Tenure of Office act. *Pamph. L. 1911, p. 783.*

This act was decided to be unconstitutional by this court in *Kudlich v. Griffin et al.*, 88 N. J. L. 573, which case is controlling here. It may be useful in this connection to point out that by the stipulation of facts in this case, it appears that the comptroller of the city of Elizabeth is a member of a commission elected by the city council, and that the act which respondent invokes for his protection against removal expressly excludes from the benefit of its provisions the members of commissions elected by the common council of a city coming within the legislative classification.

The views which we have expressed lead to the result that the demurrer be overruled and judgment of ouster entered in favor of the relator against the respondent.

JOHN FRANKLIN FORT, PROSECUTOR, v. COURT OF COMMON PLEAS OF MONMOUTH COUNTY AND CHARLES SIMONSON, JR.

Submitted March 16, 1916—Decided April 27, 1916.

The provision of the Inns and Tavern act of 1913 (*Pamph. L.*, p. 574), providing that "whenever the ratio between the population of any city, town, township, borough or village, and the number of licensed places situate therein for such sale of said liquors shall exceed the ratio of five hundred to one, additional licenses

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for sale of such liquors therein * * * may be issued," &c., expressly excludes from its provisions hotels containing upwards of fifty spare rooms and beds. Consequently, the number of such licensed hotels having upwards of fifty spare rooms and beds cannot be taken into consideration in computing the ratio of the licensed places to the population, since the provision of the statute is only intended to regulate the number of inns and taverns having less than fifty spare rooms and beds.

On certiorari.

Before Justices PARKER, MINTURN and KALISCH.

For the prosecutor, *Fort & Fort*.

For the defendants, *Durand, Ivins & Carton*.

The opinion of the court was delivered by

KALISCH, J. The prosecutor attacks the validity of the action of the Court of Common Pleas of Monmouth county in granting to Charles Simonson, Jr., a license to keep an inn and tavern in the borough of Spring Lake, which had a population of eight hundred and fifty-three, by the census of 1910, on the ground that the granting of such license was in violation of the act of 1913 (*Pamph. L.*, p. 574), in that the statutory number of licenses based upon a ratio population of five hundred to one licensed place as prescribed by the act had been exhausted, there being at the time of the granting of such license three licenses in force and effect in the borough which had been granted to the Hotel New Monmouth, the Hotel Essex and Sussex and the Breakers, each of which contained upwards of fifty spare rooms and beds.

Counsel for the prosecutor contend that though the licensing of hotels containing upwards of fifty spare rooms and beds is by express words in the act not controlled by the ratio of population, that nevertheless on the application for a license for an inn and tavern containing less than fifty spare rooms and beds, such licenses must be taken into consideration and counted on the basis of population.

This contention is asserted to be founded upon a provision in the act (on p. 576), which reads: "Whenever the ratio between the population of any city, town, township, borough or village, and the number of licensed places situate therein for such sale of said liquors shall exceed the ratio of five hundred to one, additional licenses for sale of such liquors therein * * * may be issued at the discretion of the licensing authority, but only in the manner following." The statute then prescribes a method of procedure whereby an applicant for a license to keep an inn and tavern of less than fifty spare rooms and beds may obtain a license when the ratio of existing licenses to population is less than one to five hundred. This procedure was fully discussed and considered by this court in an opinion by Mr. Justice Parker in *Tilton v. Court of Common Pleas of Ocean County*, 87 N. J. L. 47. The licensee in the present case did not resort to this procedure and defends the legality of the issuance of the license to him upon two grounds: (1) That the words "additional licenses" and "licensed premises" in the act quoted do not include within their meaning, licensed hotels, containing upwards of fifty spare rooms and beds. (2) That if licensed hotels upwards of fifty rooms are within the meaning of the act, then under another provision of the act (on p. 575), which provides that in any city bordering upon the Atlantic ocean the population shall be taken to include the transient population, and such population shall be computed as of the first day of August in any year. Spring Lake, which borders on the Atlantic ocean, and which has a transient population of four thousand, therefore, is entitled, obviously, to more than three licenses, on the basis of one license for every five hundred of population.

The facts in this case are undisputed. It is stipulated between counsel that Spring Lake is a borough bordering on the Atlantic ocean, having at the census of 1910 a population of eight hundred and fifty-three inhabitants and a transient population of four thousand August 1st, 1914; that the prosecutor and objector to the granting of the license is a resident real estate owner and taxpayer of Spring Lake; that three licenses to keep inns and taverns, being the three hotels

mentioned, each of which contains upwards of fifty spare rooms and beds were granted by the Court of Common Pleas of Monmouth county; that the license applied for and granted in the present case was for a new place and not a hotel having at least fifty sleeping rooms, nor a picnic ground or recreation place comprising at least one acre, nor was it a building entirely occupied by a regularly organized club or association; that though the three hotel licenses were each granted for one year, it was with the knowledge that the hotels would be open only during the summer months and that they have in fact only operated during the summer months, and that there is no licensed hotels in Spring Lake where the people are accommodated during the entire year.

It is obvious from a plain reading of the act that in so far as inns and taverns are concerned or places where liquors are sold in quantities less than one quart it was the intention of the legislature to regulate and fix the number of such places by a ratio of population to the number of licenses granted to places coming within that description. For the act provides that no license to keep an inn or tavern or to sell spirituous, vinous, malt or brewed liquors in quantities less than one quart in any city, town, township, borough or village shall be granted by any court, &c., unless, or until the ratio of population therein to the number of licenses issued shall be greater than five hundred to one and then only pursuant to the act now being considered. The act then excepts from the operation of this provision, (1) Premises in which the business of selling liquors was lawfully carried on at some time within a year preceding the passage of the act of 1913, provided that such business was not abandoned at any time during the year. (2) Hotels having at least fifty spare rooms and beds for the accommodation of boarders, transient and travelers. (3) Picnic or recreation grounds comprising at least one acre. (4) A building entirely occupied by a regularly organized club or association.

It is to be observed that the act places no limitation on the number of licenses that may be granted to hotels of the designated number of rooms or to picnic or recreation grounds

of certain dimensions or to regularly organized clubs occupying entire buildings.

It may very well be that in making these places exempt from the operation of the provision in the act relating to the population basis the legislature had in view the fact that, at least, as to summer hotels and clubs the use of the license privilege would be of a temporary character. That it was the intention of the legislature to put a check upon the increase in the number of inns and taverns of less than fifty spare rooms and beds and on saloons in cities is manifest.

The number of such latter places is regulated by the ratio of population, as stated, to the number of licenses granted. The licensed premises or places, therefore, which the legislature intended to limit were not fifty-room hotels, picnic grounds and clubs of the character above described, but inns and taverns of less than fifty spare rooms and beds, and saloons. This being so, it becomes clear that the terms "additional licenses" and "the number of licensed premises" cannot in the very nature of the provisions of the act refer to hotels having fifty spare rooms and beds, picnic and recreation grounds and clubs of the character mentioned, but the language used obviously refers to inns and taverns of less than fifty spare rooms and beds or saloons which were lawfully carried on at some time within a year, immediately preceding the passage of the act of 1913, and provided such business was not abandoned at the place licensed during that year. Such places meeting these conditions were entitled to be licensed irrespective of the ratio of population to the licenses granted. In order, however, to put a check upon the increase of the number of inns and taverns having less than fifty spare rooms and beds and saloons it was the clear legislative design that licenses granted to inns and taverns or saloons which met with the above statutory requirements, were to be counted on the basis of ratio of population, as fixed by the statute, whenever an application was made for a license for a new place.

It is not pretended in the present case that there was any other license granted by the court than those granted to the

three hotels mentioned, when the licensee applied for and obtained his license to keep an inn and tavern having less than fifty spare rooms and beds, and that, therefore, the granting of such license was not in violation of the statute.

Counsel for the prosecutor cite *Gundrum v. South Amboy*, 86 N. J. L. 450, to support their contention that all licenses count on the number limited, to one in five hundred, but an examination of that case shows that the precise question raised here was not there considered. This appears from what Mr. Justice Trenchard, who delivered the opinion of this court says (on p. 452): "Now the depositions show that when the license in question was granted, the city of South Amboy had, exclusive of the one in question, thirty places licensed for the sale of spirituous, vinous, malt or brewed liquors in quantities less than one quart. From the deposition it also appears that the population of the city then was seven thousand and seven.

* * * Since therefore the ratio of population to the number of licensed places was not greater than five hundred to one the license was prohibited by the statute, unless it is within some one of the provisos or exceptions contained therein."

The views expressed by the learned justice are not in conflict with the views expressed here, but rather in harmony with the general idea that the ratio of population requirement is strictly limited to the ordinary inn and tavern and saloon class. See also *Blake v. Pleasantville*, 87 N. J. L. 426, 430, 431. Counsel for defendant have urged upon us that it was stipulated in this case that the transient population of Spring Lake in the contemplation of the statute, on August 1st, 1914, was upwards of four thousand, and that there were at that time only three hotels in the borough and that if they are to be counted and the license based on the population of August 1st, 1914, the license was properly granted, because the licenses issued were not greater than one to each five hundred of such population.

As we have reached a conclusion sustaining the validity of the license on another ground, we do not deem it necessary to express any opinion on the soundness of this contention,

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except to point out that the act refers exclusively to cities bordering on the Atlantic ocean and Spring Lake is a borough.

The writ will be dismissed and the proceedings of the Court of Common Pleas affirmed, without costs.

LENA F. SCHMOLL, ADMINISTRATRIX OF THE ESTATE
OF EUGENE K. SCHMOLL, DECEASED, RESPONDENT,
v. WEISBROD & HESS BREWING COMPANY, A COR-
PORATION, APPELLANT.

Submitted December 2, 1915—Decided May 24, 1916.

Decedent was employed by appellant as a route foreman, and on Saturdays delivered beer and collected moneys therefor. On a Saturday night, while delivering beer in a locality known to the police as one where drunkenness, assaults and murders occurred with frequency, he was shot and subsequently died from his wound. There was no proof that the employer had knowledge of the bad character of the locality where decedent was working, nor was there any proof of the identity or motive of his assailant. *Held*, that the employer was not chargeable with the risk decedent assumed by reason of some peculiar and extraordinary situation, unless it appears that he was aware of such added risk; and *Held, further*, that although if there had been testimony showing that the object of the attack was robbery of the employe, the employer would have been liable, the risk of robbery of a person known to carry considerable sums of money being a risk incident to the employment, yet in the absence of proof of motive for the attack, robbery will not be presumed to have been the motive thereof, as the motive may have been revenge or fancied wrong, or the shooting accidental.

On *certiorari*.

Before Justices PARKER, MINTURN and KALISCH.

For the appellant, *Edward L. Katzenbach*.

For the respondent, *Ulysses G. Styron*.

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The opinion of the court was delivered by

KALISCH, J. The single question presented for review is whether on the undisputed testimony of the case the Court of Common Pleas was warranted in finding that the death of the respondent's decedent was the result of an accident arising out of the decedent's employment.

The deceased was a route foreman in the employ of the respondent. His duties were to look after the various beer delivery routes and see that they were properly conducted, and on Saturdays he had a beer delivery where he delivered beer and collected the moneys therefor.

On the 19th day of December, 1914, on a Saturday night, at about eight o'clock, the deceased made a delivery of beer at some dwelling-house in Atlantic City, leaving his wagon in the street, a little distance away, and while returning to his wagon he was assaulted and shot by some person unknown.

The deceased mounted his wagon and returned to the brewery and accounted to his employer for the moneys entrusted to and collected by him and then went to a hospital where he, ten days later, died from the effects of the gun shot wound.

The respondent filed her petition for compensation under the Workmen's Compensation act, and the trial judge found, in addition to the above-recited facts, that the territory in which the deceased was called upon to deliver beer and make collections was known to the police department as one where drunkenness, assaults with intent to kill and murders occurred with greater frequency than in any other part of Atlantic City, and where persons who commit robbery resort. And this led the learned trial judge to conclude as follows:

"It may be inferred that one engaged in a business similar to that pursued by Schmoll, and whose duty called him to such a neighborhood, might expect an assault, not necessarily fatal, as a reasonable incident to his employment—an extraordinary risk which was indirectly connected with his employment owing to its special nature.

"I find, therefore, that Schmoll's death was the result of an accident arising out of and in the course of his employment."

Whether the death of the deceased was the result of an accident arising out of his employment was a mixed question of law and fact. Therefore, before the trial judge could properly find that the accident to the deceased arose out of his employment, it was essential that there should have been some fact or circumstance established to support such finding. *Bryant, Administratrix, v. Fissell*, 84 N. J. L. 72. This leads to the inquiry whether there was any fact or circumstance which reasonably permitted the inference to be drawn that the accident to the deceased arose out of his employment.

The trial judge obviously acted upon the theory that because the deceased was a collector for a brewery, and since the duties of his employment required him to go into a neighborhood where lawless acts were frequently committed and lawless characters congregated, that therefore the deceased was exposed to a risk of being attacked by lawless persons for the purpose of robbery which was a risk directly, or, at least, indirectly, connected with his employment.

We do not think that the character of the place where the attack was made upon the deceased under the testimony of this case is of any particular significance, since it does not appear that the employer had any notice or knowledge of the danger of the locality. The proof in the case went no farther than to tend to establish that the police department had such knowledge.

That being the case, the employer ought not be chargeable with any risk which the place where the work was to be performed entailed by reason of some peculiar and extraordinary situation existing there, unless it was made to further appear that he was aware of such added risk. The accident must not only arise in the course of the employment but also out of the employment. The accident must reasonably be directly or indirectly connected with the employment. The legal principle which must govern the facts of the present case is the same as was applied in those cases where it was held, that if an employer had no knowledge of a practice existing among his employes which added a risk to the employment which otherwise did not exist and would not have arisen,

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except under special circumstances, it would be plainly unreasonable to hold that the employer was bound to anticipate an accident happening from such unknown risk. But where the employer knows of such practice resulting in additional risk and does not forbid it and an accident happens, the accident will be deemed as arising out of the employment. *Terlecki v. Strauss*, 85 N. J. L. 454; affirmed by Court of Errors and Appeals, 86 *Id.* 708; *Hully v. Moosbrugger*, 88 *Id.* 161.

If it had appeared by the testimony in this case that the attack that was made upon the deceased had for its object robbery, then it would have been clearly immaterial whether such attack was made in a lawless or a law abiding district. For then the case would fall within the principle laid down in *Nisbet v. Rayne and Burn* (1910), 2 K. B. 689, cited with approval in *Bryant v. Fissell*, *supra*, where it was held that the death of the cashier who was robbed and murdered in a railway carriage while carrying money to pay the wages of his employers' workmen, was caused by accident arising "out of" and in the course of his employment, on the ground that the risk of being robbed and murdered is a risk incidental to the employment of those who are known to carry considerable sums in cash on regular days by the same route to the same place.

In the present case the testimony utterly fails to show any motive for the attack upon the deceased. The assailant of the deceased was unknown. His motive in making the attack was also unknown. No robbery or attempt at robbery was shown.

The person who shot the deceased might have shot him out of revenge for some fancied wrong or by mistake or by accident. There was no proven fact or circumstance before the court below that connected the shooting either directly or indirectly with the employment of the deceased, either as driver or collector.

The judgment must be reversed.

D'Aloia v. Summit.

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J. VICTOR D'ALOIA, PLAINTIFF-RESPONDENT, v. CITY OF
SUMMIT, DEFENDANT-APPELLANT.

Submitted February 15, 1916—Decided May 12, 1916.

Fines paid upon conviction for the violation of a city ordinance, subsequently set aside by the appellate court, cannot be recovered back when such fines were paid without protest, and two forms of appeal were available to the defendants, as alternatives to paying the fines or serving time in jail.

On appeal from the District Court.

Before Justices GARRISON, TRENCHARD and BLACK.

For the appellant, *Corra N. Williams*.

Pro se, J. Victor D'Aloia.

The opinion of the court was delivered by

BLACK, J. The appeal in this case presents a single point for discussion and decision, viz., whether the payments of fines which were the subject of the suit in the trial court, were voluntary payments and made without duress of the person.

The action was brought by the plaintiff, as assignee, to recover fines from the city of Summit, imposed upon five defendants, by the police court of the city of Summit, for the violation of a city ordinance. Subsequent to the imposition and payment of the fines, the conviction of the five defendants was, upon review, set aside by the Union County Court of Common Pleas. This judgment of the Court of Common Pleas was affirmed by the Supreme Court. *City of Summit v. Iarusso*, 87 N. J. L. 403. At the time of the payment of the fines, the five defendants were under arrest upon complaint for the violation of a city ordinance, having been sentenced to pay a fine or serve time in jail. At the time the fines

were paid, the defendants made no protest against their payment.

The police court of the city of Summit was established under the act of the legislature, approved March 21st, 1899, page 96. Under section 78 of said act, the defendants had a right to appeal in the same manner as an appeal might be had from judgments in the court for the trial of small causes, under section 80 of the act of 1903, page 251.

The defendants also had a right to appeal to the Court of Common Pleas, under the act of 1908, page 442, which later act was the one under which the appeal was taken and the convictions set aside. The District Court held, that the fines were not voluntary payments, but were made under what is known in law as duress of the person, and gave judgment for the plaintiff in the sum of \$313.50, being the amount of the fines. This, we think, was error. The judgment of the District Court should be reversed.

The legal idea of duress consists in forcing a person to act against his own will. It does not exist when the person upon whom it is charged it has been exercised has an option or choice as to whether he will do the thing or perform the act said to have been done under duress. The defendants had at least three courses open to them, in addition to the one which they pursued, viz., first, to pay the fines under protest; second, they might have taken an appeal and avoided the payment of fines, under the act of 1899, page 96, section 78, or *Pamph. L.* 1903, p. 276, § 80, above cited; or third, to apply to the Court of Common Pleas under the act of 1908, page 442. This was the action which they ultimately did take, but not until after they had paid the fines. The fines were paid July 9th, and the proceedings were not questioned until July 17th, 1914.

The rule seems to be quite clear, but in its correct application there is some confusion. There is no case in our reports directly in point.

In our courts, Mr. Justice Dixon, speaking for the Court of Errors and Appeals, said: "That where a party, without mistake of fact or fraud, duress or extortion, voluntarily pays

money on a demand which is not enforceable against him, he cannot recover it back." *City of Camden v. Green*, 54 N. J. L. 591, 593. In that case the principle was applied to a refusal to issue a license, without payment of more than the legal fee. *Held*, it was not duress. So the payment of a city assessment, under protest, cannot be recovered back. *Fuller v. City of Elizabeth*, 42 *Id.* 427. This case was based upon *Davenport v. City of Elizabeth*, 41 *Id.* 362.

So the payment of a license fee to a city board of health, accompanied by a written protest against the right of the board to exact it. *Shoemaker & Co. v. Board of Health*, 83 N. J. L. 425. Or a fine paid by a policeman for delinquency. *Mee v. Montclair*, 84 *Id.* 400, reversing 83 *Id.* 274. So also, money paid under legal process in a judicial proceeding. *Turner v. Barber*, 66 *Id.* 496.

In other jurisdictions it has been held that a fine illegally imposed, but voluntarily paid under mistake of law, cannot be recovered back. *Houlehan v. Inhabitants of Kennebec County*, 108 *Me.* 397 ; 19 *Cyc.* 558.

The case of *Bailey v. The Town of Paullina*, 69 *Iowa* 463, holds, that where a defendant is convicted on a town ordinance which is void and pays the fine without disputing its validity and without protest, he cannot recover the amount of the fine in an action against the town. This case is cited with approval in the case of *Harrington v. City of New York*, 81 N. Y. *Supp.* 667 ; 40 *Misc.* 165.

The same rule was followed in the case of *Houtz v. Board of Commissioners of Uinta County*, 11 *Wyo.* 152.

It therefore seems to be the rule deducible from the cases, that if the defendants had an alternative to making the payments, the payments must be regarded as having been voluntary and therefore not recoverable. They were made without protest, and two forms of appeal were available to the defendants as alternatives to paying the fines.

By the act of 1911, page 30, it was lawful for the city of Summit to return these fines. This, however, is not a judicial question.

The judgment of the District Court is reversed, with costs.

JOHN POTTER, PROSECUTOR, v. THE BOARD OF PUBLIC
UTILITY COMMISSIONERS, THE CENTRAL RAILROAD
COMPANY OF NEW JERSEY, AND THE TOWNSHIP OF
CRANFORD, UNION COUNTY, NEW JERSEY.

Argued December 24, 1915—Decided June 23, 1916.

1. Property merely desirable for park development around the railroad station cannot be ordered taken by the board of public utility commissioners under the act of 1913. *Pamph. L.*, p. 91.
2. The order of the board of public utility commissioners, in such a case, cannot be sustained under the acts of the legislature. *Pamph. L.* 1914, p. 490. or the act of 1911. *Pamph. L.*, p. 379, § 17b.
3. The Supreme Court, on *certiorari*, has power to review the testimony to ascertain whether or not the order is supported to any extent by the facts submitted to the board for consideration.

On *certiorari* to review an order of the board of public utility commissioners, altering a certain grade crossing under *Pamph. L.* 1913, p. 91, known as the Fielder Grade Crossing act.

Before Justices GARRISON, TRENCHARD and BLACK.

For the prosecutor, *Robert Carey*.

For the Central Railroad Company of New Jersey, *George Holmes*.

For the township of Cranford, *Berkeley C. Austin*.

For the board of public utility commissioners, *Frank H. Sommer*.

The opinion of the court was delivered by

BLACK, J. In this case there are forty reasons presented to the court for setting aside the order made by the board of public utility commissioners. The order is dated the

16th day of April, 1915. All the points involved in these reasons, however, have been disposed of in the opinion filed this term, in the case in which the Erie Railroad Company is prosecutor and the city of Paterson is defendant, except those points which will now be brought under discussion. In general terms they are, that in so far as the order directs the taking of the prosecutor's property, it is in excess of the jurisdiction of the board of public utility commissioners, and also, the findings of the board are not supported by the evidence. On both of these grounds the order of the public utility commissioners in this case will have to be set aside. The board in its report found that a proposed walk, "known as North avenue, the walk extending westward through the small triangular block known as the Potter building, returning into the westerly sidewalk of Eastman street. In the development of this plan, the Potter building is therefore proposed to be taken for the triple purpose of making an adequate approach to the station, a new highway from the west, and to open the end of Eastman street in a proper manner. * * * The taking * * * of the Potter property on the north side of the tracks bounded by Eastman street, North avenue and Union avenue, are necessary for the full, proper and adequate development of the problem of providing a proper accommodation for traffic to and from the north and south sides of the railroad. * * * In its judgment, however, a proper and adequate development and treatment of the problem before it makes necessary the adoption of the plan as a whole and the taking of the property requisite to its execution."

The facts, as shown by the record, illustrating the situation, upon which the board of public utility commissioners were called upon to act, in brief, are these: a petition had been filed by the township committee of the township of Cranford, Union county, under the act of 1913 (*Pamph. L.*, p. 91), known as the Fielder Grade Crossing act, petitioning the board to alter the grade crossing of Union avenue with the Central Railroad Company of New Jersey, at Cranford; at that point, Union avenue and the Central Railroad Company of New

Jersey cross at the same level. The angle of crossing is about forty-five degrees. Walnut avenue on the south and Eastman street on the north side of the crossing of Union avenue terminate at the crossing. Stations of the railroad company are located on each side of the tracks. They are connected by an underground passageway, located wholly on the lands of the railroad company. Six main tracks and a siding cross Union avenue at that point. Schedule A shows in detail the plan of alteration. The only material part which is necessary for this discussion is that part which shows the new underground passageway between the two stations. The opening on the north side is directly opposite the apex of the triangular building of the prosecutor, at the junction of Eastman street and North avenue. The opening at the south end of the new proposed underground passageway comes out on a new highway on the south of the railroad tracks, which connects Union avenue with Walnut avenue.

Mr. Mosher, the township engineer, testified the building on the triangular plot of land in the angle between Eastman street and Union avenue is approximately twenty (20) feet from the right of way line of the railroad company. It does not abut on the railroad property at any point. He does not pretend to say in any portion of his testimony that the taking of the Potter property is necessary to the alteration of the grade crossing. Neither does Mr. Owen, the engineer for the Central Railroad Company, the only other engineer testifying. The best that can be said of this testimony is that the Potter property is desirable for park development in connection with the new subway. It is desired so that it may be used as an approach to the proposed new foot subway.

From Mr. Owen's testimony these questions and answers are taken:

"Q. So that in your judgment as an engineer, it was entirely feasible and practicable to eliminate that crossing if necessary, without interfering in any way, shape or manner with the Potter property?

"A. It is practicable, yes.

"Q. In your judgment, then, the destruction of the Potter property and the taking of it as a part of this improvement is simply in the interest of the park development around the station?

"A. It is in the general interest of the improvement, both from the railroad standpoint and the municipal standpoint.

"Q. But has no distinct relation to the abolition of the crossing?

"A. Not necessarily, no."

We think the findings of the board are not supported by the testimony on this branch of the case. This court has the power to review the testimony, to ascertain whether or not the order is supported to any extent by the facts submitted to the board for its consideration. *Erie Railroad Co. v. Board of Public Utility Commissioners*, ante p. 24; *West Jersey, &c., Railroad Co. v. Board of Public Utility Commissioners*, 87 N. J. L. 170; 94 Atl. Rep. 60; *Public Service Gas Co. v. Board of Public Utility Commissioners*, 84 N. J. L. 463; 88 Id. 603; 95 Atl. Rep. 127; *Erie Railroad Co. v. Board of Public Utility Commissioners*, 87 N. J. L. 438; 95 Atl. Rep. 177. Nor can we find anything in the act of the legislature which gives the board of public utility commissioners jurisdiction to order private property taken when, as in this case, such property is not fairly incidental nor necessary to the elimination of the danger or impediment at the crossing involved in the petition and order. That such property may be desirable for the purpose of park development around the railroad station is not sufficient to give the board jurisdiction, under this statute, for ordering private property to be taken.

It is urged, however, the order may be sustained under the act of 1914 (*Pamph. L.*, p. 490), which confers upon the railroad company power to take by condemnation any land and property required for the purpose of complying with any order made by the board of public utility commissioners, upon ascertainment and payment or tender of compensation, as provided by law. Or under the act of 1911 (*Pamph. L.*, p.

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379, § 17b), which confers upon the board of public utility commissioners power after hearing, upon notice, to require every public utility to furnish safe, adequate and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so. It requires no argument to show that the order of the board cannot be sustained under either of these statutes. They cannot be made to apply to this proceeding by any accepted canons of statutory interpretation.

For these reasons, the order made by the board in this case will be set aside, with costs.

AARON SHAPIRO, PLAINTIFF-RESPONDENT, v. MIKE
DE LEUCE, DEFENDANT-APPELLANT.

Submitted February 15, 1916—Decided May 12, 1916.

In an action of replevin, when a demand for possession is necessary, a demand made upon the wife of the defendant is not sufficient to maintain the action against the husband.

Before Justices GARRISON, TRENCHARD and BLACK.

For the respondent, *James R. Stewart, Jr.*

For the appellant, *William A. Lord.*

The opinion of the court was delivered by

BLACK, J. This was an action of replevin brought in the East Orange District Court against the defendants, Mike De Leuce and Mary De Leuce, his wife, to recover certain goods under a conditional bill of sale. The case was tried by the court without a jury, resulting in a nonsuit as to the defendant Mary De Leuce, and judgment for possession against the defendant Mike De Leuce. The ruling of the

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court granting a nonsuit in favor of the defendant Mary De Leuce is not contested. The judgment against Mike De Leuce is attacked on the sole ground that the trial court held, that the demand for possession made upon the wife, Mary De Leuce, was a sufficient demand in law to maintain the action against the husband, Mike De Leuce. This is the only question brought under discussion in this appeal. The court held, that the wife was for the purpose of making the demand the agent or servant of the husband. This, we think, was error. At the time the demand was made upon the wife, she said, "No, no, no. Don't take the goods. Wait until my husband comes home." There is a line of authorities, and they are quite uniform in holding, that, when a demand is necessary in replevin, a demand upon the wife in a suit against the husband is not sufficient to maintain the action.

The rule is stated in *Cobb. Repl.*, § 481, thus: "A demand of one not having authority to deliver or refuse and having no control over the chattels is insufficient. It should usually be made personally upon one in possession and who has power to comply. Demand on wife or servant is not sufficient demand on husband or master. Demand at the house of a bailee in his absence is not good unless knowledge of the demand is brought home to him before the action commenced." To the same effect are: *Wells Repl.*, § 375; *Mount v. Derick*, 5 Hill 454; *Storm v. Livingston*, 6 Johns. 44; *Wheeler & Wilson Mfg. Co. v. Teetzlaff*, 53 Wis. 211; 34 Cyc. 1413. This, of course, is based on the theory that the law presumes if one has the possession of goods to which he is not entitled, he will give up the possession, on demand, to the rightful owner, without the trouble and expense of a lawsuit.

For the error thus pointed out, the judgment of the District Court is reversed, with costs.

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**TOWNSHIP OF HAMILTON, RELATOR, v. MERCER COUNTY
TRACTION COMPANY ET AL., RESPONDENTS.**

Argued June 20, 1916—Decided June 26, 1916.

When a rule to show cause why a peremptory writ of *mandamus* should not issue has been made absolute, and after such decision was announced, the respondents, for the purpose of reviewing it, obtained leave to frame pleadings upon which a final judgment might appear on the record, the return in such fictitious pleadings to the alternative writ must aver no fact and must tender no issue as to any fact that was not before the court at the time the decision to be reviewed was pronounced.

On motion to frame pleadings.

Before Justices GARRISON, TRENCHARD and BLACK.

For the relator, *Linton Satterthwaite*.

For the respondents, *Frank Bergen*.

PER CURIAM.

On April 29th, 1915, the relator obtained a rule to show cause why a writ of *mandamus* should not issue commanding the respondents to complete the construction of a street railway; under which rule each party took testimony which was completed on May 21st, 1915. At the November term the rule was brought on for argument and a decision was rendered, covering all the points presented by the testimony, making the rule absolute and directing that a peremptory writ of *mandamus* issue.

Counsel for the respondents, being desirous to review this decision, obtained leave to frame pleadings by which such decision should be presented to the appellate court as a final judgment. The practice is set forth in *Hoos v. O'Donell*, 60 N. J. L. 35. Under this practice the judgment final that is formally to take the place of the decision that was actually

rendered appears upon the record as having been pronounced upon a demurrer to the return made by the respondents to an alternative writ of *mandamus* which by the fiction the relator is supposed to have obtained. The fictitious writ, return, demurrer and judgment thus constructed after the actual decision has been rendered in another form of procedure have but a single purpose, viz., to place such decision in a shape in which it can be reviewed under section 4 of the *Mandamus* act.

To this end it is imperative that the fictitious return to a demurrer by which the question already decided is presented shall aver no fact and shall tender no issue that was not before the court that rendered such decision. Otherwise there would be no review of such decision, but instead thereof an original consideration by the appellate tribunal of a case that was different from that upon which the court of first instance had given its judgment. The only alternative is that the relator would be forced to plead to such new fact or issue in which event under the guise of a practice proceeding the decision of the court would be set at naught without review and a new case be submitted to the court and perhaps to a jury for original consideration. Such a result is not for a moment to be considered. Every consideration whether of theory or practice requires that the fictitious return shall be strictly of the character indicated and in no respect otherwise.

In the present case the return prepared by counsel for the respondents departs from this rule in the respects pointed out in the brief of counsel for the relator. A demurrer to such a return would not present the questions passed upon by the decision of this court. A return free from these or other similar objections and so framed as to comply with the views expressed in this memorandum may be tendered to counsel for the relator within ten days, otherwise the attempt to frame pleadings that shall present the decision for review will be deemed to be abandoned.

CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY

MARCH TERM, 1916.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
PLAINTIFF-RESPONDENT, v. REGINALD H. MORGAN,
JR., TREASURER OF UNITED STATES EXPRESS COM-
PANY, DEFENDANT-APPELLANT.

Argued March 21, 1916—Decided June 19, 1916.

The plaintiff-respondent and defendant-appellant entered into an agreement which provided, *inter alia*, that the express company assumed all risks of injuries to person or property of any employes exclusively in its service while upon the premises of the railroad company, and agreed to indemnify and save the railroad company harmless from all claims that might be made against it, and from all loss, damage and expense that might be so incurred by it, as well as against the expense of resisting any such claims, whether successfully resisted or not, it being understood that the railroad company should not, under any circumstances, be responsible or liable for any such loss, damage or injury. Thereafter two actions were instituted against the plaintiff by father and son for injuries to the latter, a minor, who, while in the exclusive employ of the express company and while driving one of its wagons from the express building to the company's stable after he had completed his work for the day, was injured by being thrown out of the wagon, which was run into by one of the railroad company's locomotives on its tracks where

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they crossed at grade a passageway maintained by it which had all of the appearances of a public street, upon which the boy was present by implied invitation from the railroad company. Judgments were recovered against the railroad company by the father and son in appropriate actions, and the company also expended certain moneys in resisting the actions. These judgments, and the sum so expended, were paid by the railroad company, and it then brought suit to recover under the contract mentioned. A jury being waived, the case was tried upon an agreed state of facts before a circuit judge who found for the plaintiff and against the defendant and awarded judgment for the full amount claimed. *Held*, correct.

On appeal from the Supreme Court.

For the appellant, *McDermott & Enright*.

For the respondent, *Charles E. Miller and George Holmes*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. This action was tried before Hon. William H. Speer, sitting without a jury at the Hudson Circuit. It was submitted on an agreed state of facts. The judge below rendered a judgment in favor of the plaintiff. The action was brought to recover certain amounts expended by the plaintiff in defending and in satisfying judgments obtained against it in two actions instituted in the Hudson Circuit Court.

The plaintiff is a railroad corporation of New Jersey, operating a steam railroad. The defendant, an express company, is a voluntary unincorporated association of New York, suable in the name of its treasurer. On June 28th, 1898, the plaintiff and defendant entered into a contract which remained in force until August 6th, 1908, when it was superseded by another contract made on that day. They both cover the transaction of defendant's express business on the plaintiff's railroad system. By each of them the plaintiff permitted the defendant's employees to be in and upon its lands, premises, property, buildings, trains and railroad for the purpose of transacting the defendant's business. By the

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contract of August 6th, 1908, the defendant agreed with the plaintiff, *inter alia*, as follows:

"The express company assumes all risks * * * of injuries to person or property or injuries resulting from the death of any employees exclusively in its service while upon the trains, ferryboats or premises of the railroad company, and agrees to indemnify and save harmless the railroad company from all claims that may be made against it, and from all loss, damage and expense that may be incurred by it by reason of loss or damage * * * by reason of any injuries to person or property by death of any such employees, as well as against the expense of resisting such claims, whether they be successfully resisted or not, it being understood that the railroad company shall not under any circumstances be responsible or liable for any such loss, damage or injury."

After the execution of the first of these contracts, but before the execution of the second, the plaintiff leased to the defendant a certain frame express building on its terminal property located at Jersey City, fronting upon the Hudson river and extending back from the river in a westerly direction for about a mile. Within the limits of this terminal property plaintiff constructed a passageway extending from the river, across its property, and connecting with Johnston avenue, a public street. The express building, leased to the defendant as already mentioned, adjoins this passageway.

In carrying on its business defendant employed a number of wagons which distributed express packages loaded on them at the express building, or brought to the express building for loading on railroad cars, packages collected. These wagons used the passageway already mentioned in going to and from the express building. It was the practice of those employed at the express building, after finishing their work, to take charge of any team and empty wagon which had made its last trip for the day, and happened to be standing at the platform, and drive with the same to the defendant's stable to avoid walking.

Charles Black was one of the persons employed by the defendant at the express building. It was his duty to check

or make a record of the packages handled there. While working for the defendant he had no other employment, business or occupation. On January 4th, 1912, after finishing his work for the day at the express building, Black, in accordance with the custom, took charge of one of the empty express wagons and drove it along the passageway mentioned toward defendant's stable. While driving at a point where the passageway was crossed at grade by one of the plaintiff's railroad tracks, the wagon was struck by an engine owned and operated by the plaintiff, and Black was thrown therefrom and injured. Thereafter the two actions were instituted against the plaintiff. One was brought by Charles Black to recover for his personal injuries; the other by his father to recover the damages sustained by him as the result of the injuries to his son, a minor.

The action brought by Charles Black was tried twice. At the first trial a verdict was directed in favor of the railroad company. On appeal, this court reversed the action of the trial court. *Black v. Central Railroad Co.*, 85 N. J. L. 197. The second trial of the son's case and the trial of the father's case resulted in verdicts aggregating \$6,000 in favor of the plaintiffs therein. The judgments entered on these verdicts were paid and satisfied by the plaintiff. In addition, plaintiff expended \$250 in resisting these claims.

The trial court in deciding the present case held that, at the time he was injured, Black was exclusively in the service of the defendant, having no other employment; that his injuries were sustained while on the premises of the plaintiff, and that, therefore, the defendant was bound to indemnify the plaintiff, under the above-quoted provision of the contract of August 6th, 1908, for the moneys it had thus expended.

To use the language of the agreement of August 6th, 1908, the express company assumed all risks of injury to the person of any employe exclusively in its service while upon the premises of the railroad company, and agreed to indemnify and save it harmless from all loss, damage and expense that might be incurred by reason thereof.

In the agreed state of facts it is stipulated that, while driving a team of the defendant, Black, who was exclusively

in the service of the defendant, was injured on the premises of the plaintiff—on its passageway—where it was crossed at grade by its railroad track, the team and wagon which Black was driving having been struck by a locomotive owned and operated by the plaintiff, Black being thrown from the wagon and injured.

The defence in this case was rested upon two points—*first*, that the roadway in question was no part of the premises of the railroad company which the employees of the express company were licensed to use, but that they used the roadway as a public highway; and *second*, that at the time of the injury Black had finished his work for the day and was not in the discharge of his duties as an employee of the express company.

In the agreed state of facts it is stipulated that the passageway upon which Black's injury occurred was the same as that dealt with by this court in *Black v. Central Railroad Co.*, *supra*, which was the first suit growing out of the accident that was tried and which resulted in the reversal of a judgment for the defendant with a *venire de novo*; and the stipulation proceeds to state that the controversy here in question concerns the liability between the railroad company and the express company for the consequences of the same accident and injury passed upon in the above reported case. In that case (*Black v. Central Railroad Co.*) Mr. Justice Garrison, speaking for this court, said (at p. 200):

"The plaintiff was injured while driving along a way which, if not a street, had very much the appearance of one. It was a continuation of a city street. It was paved like a street. It was lighted and sprinkled like a street. It was patrolled by the city police like other streets, and where it was crossed by railroad tracks flagmen were stationed as is customary at street crossings. All of these things, with the exception of the police patrol, were the acts of the defendant. If, therefore, the way in question presented the appearance of being a street, the defendant had created such appearance and was therefore responsible for the consequences, one of which was that persons generally might use the way in the belief that

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it was what it appeared to be. And to such user the liability of the defendant, arising out of the appearance so created by it, would be the same as if such street actually was what it appeared to be, under the rule that 'one who holds out a way as a public street, is liable.' 29 Cyc. 454.

"Such liability is based not upon the landowner's dedication of the street and its acceptance by the public, but upon the appearance he has created, so that the question for the jury is not whether such acts of the owner were proof of an intention to dedicate a public street, but whether they had created an appearance calculated to induce the public to use the way in the belief that it was what it appeared to be.

"Although the fundamental principle that underlies this doctrine is that of estoppel, it is generally treated under the head of implied invitation, thereby distinguishing it from express or inferred invitation, which is limited to those having business with the owner of lands or upon his premises."

While this decision does not operate as a judgment *res judicata* because the defendant here, the express company, was not a party to the suit in which the judgment was rendered and had no opportunity to defend there, nevertheless, it operates *stare decisis*, that is, as a question settled by decision and forming a precedent which is not to be departed from. Its application here requires a holding that Black was injured on the premises of the railroad company which he was invited to use as though it were a public way.

As to the second point. It is true that Black had finished his work in the express building before the accident happened to him. What he did was to take one of the defendant's teams and empty wagons and drive out from the building along the roadway toward the defendant's stable. This was not part of Black's regular duties, but it was the practice of those employed by the express company, having finished their work at the building, to take charge of any team and empty wagon which had made its last trip for the day and drive it to the stable for the purpose of avoiding a long walk. The situation in this regard was like that in *Cicalese v. Lehigh Valley Railroad Co.*, 75 N. J. L. 897, where this court held:

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"Where a railroad company provides hand-cars for the transportation of its employes from the place where they have been working to a point convenient to their homes, even if the journey is commenced after the usual work of the day has ceased, the relation of master and servant continues until the employe has reached the destination to which he is being carried by, or with the consent of the company."

There is no question as to the facts in the case at bar, and in deciding that Black was in the exclusive employ of the express company and on the premises of the railroad company when he sustained his injuries, although his day's work had been finished and he was taking a team and wagon of the express company to its stable, the trial court was correct in point of law. The stipulated facts upon this head made the law of the Cicalese case applicable. The judgment under review must be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

For reversal—None.

STILLE C. CHEW ET AL., PARTNERS TRADING AS CHEW BROTHERS, PLAINTIFFS-RESPONDENTS, v. PENNSYLVANIA RAILROAD COMPANY, DEFENDANT-APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

In order to recover damages caused through an obstruction to navigation by a bridge across a navigable stream in this state, it is not necessary for a plaintiff to plead or prove that the secretary of war has not proceeded under the River and Harbor act of congress, approved March 3d, 1890, to ascertain that the given bridge is an unreasonable obstruction to free navigation.

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On appeal from the Supreme Court.

For the appellant, *Gaskill & Gaskill*.

For the respondents, *John Boyd Avis*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. The respondents, Chew Brothers, the owners and operators of a floating dredge for the digging of mud, sand and other materials, having procured employment for their dredge at a point above a bridge erected by the appellant, the Pennsylvania Railroad Company, over and across Crosswicks creek, a navigable stream in the county of Burlington in this state, proceeded to take the dredge up the creek, but because of the obstruction to navigation in the stream by the bridge, it became necessary for respondents to take down the superstructure of their dredge in order to navigate the same up the creek beyond the bridge and point of obstruction. After thus navigating the stream beyond the bridge and completing their work, respondents were again obliged to take down their superstructure to repass the bridge and get out of the stream.

The only question submitted to the court below was, whether or not the plaintiffs were precluded from recovering, because they failed to allege in their pleadings and substantiate by proof, that the bridge in question had been declared by the secretary of war to be an "unreasonable obstruction" under the provisions of the River and Harbor act of congress approved March 3d, 1899.

It was admitted that the defense was rested entirely upon the federal statute, and that the bridge actually did obstruct the respondents in the navigation of their dredge, so that they sustained damage to the extent of \$600, which amount was to be found by the jury by direction of the court, if the court decided, as matter of law, that the statute did not protect the appellant. The trial judge at the conclusion of a colloquy with counsel, in which these admissions were made,

directed the jury to return a verdict for the respondents for \$600, and gave counsel for the appellant an exception.

In the eighteenth section of the federal statute mentioned it is provided:

"That whenever the secretary of war shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes recommended by the chief of engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them."

It then provides penalties for disregard of the secretary's notice, and for prosecution of the offender.

Counsel for appellant urged that if the secretary of war does not act and decide a given bridge to be an unreasonable obstruction to navigation, the bridge is, or at least must be held to be, not such an obstruction; for, after reading the above-quoted part of section 18 of the statute, he argued to the court that "the secretary of war not having good reason to believe that this bridge was an unreasonable obstruction to navigation and not having given notice to the complainants and to the owners of the bridge to appear and not having decided that it was an unreasonable obstruction, and not having given notice to the company to alter so that it would not be such obstruction, that no case has been presented here on the part of the plaintiff." This contention is groundless.

Crosswicks creek is a navigable stream lying wholly within

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the limits of New Jersey, and the authority of this state over it is plenary, and subject only to such action as congress may take in execution of its power under the federal constitution to regulate commerce among the states. *Cummings v. Chicago*, 188 U. S. 410 (47 L. ed., pp. 525, 530). The power delegated by congress under this statute to the secretary of war not having been exercised by him leaves the matter of obstruction to navigation in the creek wholly subject to the law of this state. See *Attorney-General v. Hudson County Water Co.*, 76 N. J. Eq. 543, 560.

An action will lie against a person or corporation for damages arising from an unlawful obstruction of a navigable stream. *Mehrhof v. Delaware, Lackawanna and Western Railroad Co.*, 51 N. J. L. 56.

In *Anderson v. Pennsylvania Railroad Co.*, 76 N. J. L. 718, this court approved the remarks of Circuit Judge Jenkins in *Clement v. Metropolitan Railway Co.*, 123 Fed. Rep. 271, as follows:

"A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft and maintained in suitable condition therefor."

And it was observed at p. 727:

"The duty of railroad companies to maintain and operate drawbridges on navigable streams and provide bridge-tenders thereon, and to open the draws for free passage of vessels, is declared by statute. *Pamph. L. 1903*, p. 655, §§ 16, 17."

See the General Railroad law, *Comp. Stat.*, pp. 4215, 4228.

It is unnecessary to pursue the inquiry farther. As the law of this state gives an action for damages caused by the obstruction of navigable streams, the direction of a verdict

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for respondents for the sum in which they were admitted to have been damaged by reason of the particular obstruction mentioned, was entirely correct.

The judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

IDA H. GERETY, PLAINTIFF-RESPONDENT, v. THE NEW YORK AND NEW JERSEY RAILROAD COMPANY, A CORPORATION, DEFENDANT-APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

1. It is error in law, if, in the charge of a judge to a traverse jury, a fact of moment clearly connected with the merits of the case is said to be in proof, when there is no testimony to support the assertion; and this in a civil as well as a criminal case.
2. A railroad conductor took up a commutation ticket presented by Miss I. H. G., which was issued in the name of Mr. I. H. G. She sued to recover damages resulting from the failure of the company's ticket agent to deliver to her a commutation ticket for which she had asked and paid. There was no testimony whatever which tended to show any commotion in the car or that the plaintiff was made a spectacle of when the conductor took up the ticket. *Held*, that the trial judge erred in charging the jury that the plaintiff was entitled to recover for indignity inflicted upon her in having the ticket taken away. *Held, further*, that, in the absence of proof of indignity or the like, the true measure of damages was the value of the ticket in question at the time it was taken up.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 16.

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For the appellant, *Collins & Corbin*.

For the respondent, *Patrick Henry Maley*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. This is an appeal from a judgment of the Supreme Court affirming a judgment of the District Court of the Third Judicial District of Bergen county on the verdict of the jury in favor of the plaintiff-respondent. The plaintiff sued the railroad company to recover damages resulting to her from the failure of its ticket agent to deliver to her a commutation ticket for which she asked and paid, and for delivering to her a commutation ticket that read *Mr. I. H. Gerety*, instead of *Miss I. H. Gerety*, which ticket, while riding on one of defendant's trains, was presented by her to the company's conductor, who took it up. The action is not one for the taking up of the ticket or refusal by the conductor to permit her to ride upon its train, but, as already stated, for damages for failing to deliver to her the ticket for which she had asked and paid.

Two reversible errors are perceived in the charge to the jury by the trial judge: (1) in the instruction that the plaintiff was entitled to recover for the indignity which she suffered by having the ticket taken away from her and for the feelings of distress and mental anguish that came from her being made a public spectacle, when, in fact, there was no evidence to justify such a finding, and (2) in his instructions as to the measure of damages generally.

1. On the subject of the alleged indignity and wounded feelings, the court charged as follows:

"Now, she is entitled to recover * * * for the indignity which she suffered by having that ticket taken away from her. She is entitled to recover for her feelings of distress and mental anguish that came from her being made a public spectacle, without the conductor saying anything to her, by the mere taking of the ticket away from her caused some com-

motion in the car and beside that she is entitled to recover for a continuation of those feelings."

There is not a word of testimony in the record which shows that at the time the conductor took up the ticket the plaintiff was made a spectacle of to others on the car, or that the taking away of her ticket caused any commotion whatever. For aught that appears she was the sole and only passenger in the particular car in which she was riding and the conductor merely, upon inspecting her ticket and finding that it was made out in the masculine instead of the feminine gender, took it up and collected her fare. In this situation of the proofs not only was the trial judge not warranted in charging that the plaintiff was entitled to recover for indignity suffered and for feelings of distress and mental anguish, but was further not justified in didactically asserting to the jury in effect that she was made a public spectacle of, and that the mere taking away of her ticket caused some commotion in the car.

In *Smith and Bennett v. State*, 41 N. J. L. 370, this court held:

"It is error in law if, in the charge of a judge in a criminal case, a fact of moment clearly connected with the merits is stated to be in proof, when such fact has neither testimony nor the color of testimony to support it."

It must not be understood that the doctrine thus enunciated is confined to criminal causes. The case there under consideration was of that character and was on writ of error to the Hudson Oyer and Terminer. In writing the opinion of the court, Chief Justice Beasley observed (at p. 385):

"It has already been said that it is competent for the judge presiding at a criminal trial to lay before the jury for their consideration his own views and inferences from the proofs, and that such expressions, no matter how ill-advised or erroneous, can be reviewed on a motion for a new trial, but not on a writ of error; but the defect in this case is that a story is imputed to this defendant, and put in her lips, which she never uttered, and thus a fact, of the utmost importance, is,

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by unguarded expressions, imported into the testimony, and the introduction among the proofs of such foreign admixture must of necessity be held to constitute error in law."

In *Camden and Atlantic Railroad Co. v. Williams*, 61 N. J. L. 646, 652, an action for damages by reason of death resulting from accident, it was held that where a material fact is stated as being in proof when there is no evidence at all to support the statement, there is legal ground of error, citing *Smith and Bennett v. State*, *supra*, as authority. And thus it appears that the doctrine is equally applicable in a civil suit.

2. On the question of the measure of damages generally the trial judge charged the jury as follows:

"Now, gentlemen, you are not to fix this verdict large because this is a railroad company that has to pay, neither must you fix it small. But you must fix it for what you think is a fair and reasonable basis that would compensate this plaintiff for the money she has paid out and the mental suffering she has had because of this mistake and careless act of the agent of the railroad company; if you find that the agent was careless, and providing you find that she used reasonable care so as to ascertain there was a mistake or not; and if you find that she did that, then you find your verdict for such an amount, in addition to the amount she paid out and use your judgment. Take the matter and consider it carefully and weigh it in such a way that the verdict will square with your conscience; so that you deal, not only justly with the plaintiff, but with the railroad company."

Here was a positive instruction that the jury were not to return a large verdict because the defendant was a railroad company, and that they *must* not return a small one. This was not cured by following it with an instruction that the jury should fix what they thought fair and reasonable compensation for the plaintiff for money paid out and mental suffering. This must only have served to confuse the jury. If in their deliberations they thought that a small amount would compensate the plaintiff, still, under the charge, they

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could not return such a verdict, for they were expressly told that they *must* not award a small amount.

In *State v. Lang*, 87 N. J. L. 508, this court said (at p. 514):

"In *Huebner, Administrator, v. Erie Railroad Co.*, 68 N. J. L. 468, where the judge instructed the jury as requested upon a certain question, but so modified that request by other instructions as to likely mislead the jury and thereby harm the defendant, a new trial was granted. That was a civil suit. The rule will be applied with equal, if not greater, liberality in a criminal case."

Miss Gerety, in purchasing her commutation ticket on the New York and New Jersey Railroad Company for the month of August, 1914, presented a \$10 bill to the agent of the company and received the ticket in question and change (amount not stated) and used the ticket for rides up to the 29th day of August when, for the first time apparently, the conductor noticed that it was made out to a *Mr.* instead of a *Miss*, and took it up and collected fifty cents from her.

Harris v. Delaware, Lackawanna and Western Railroad Co., 77 N. J. L. 278, was an action for conversion of a commutation ticket. It was taken up by the conductor because, as he asserted, the plaintiff had permitted others to travel upon it in violation of one of its terms. The trial judge charged the jury that the plaintiff was entitled to recover such damages as might compensate him for the value of the ticket at the time it was taken up, and also such damages as they thought just and proper under the circumstances of the case for injury to his feelings and the ignominy thrust upon him if they found there was any. The plaintiff proved there was an altercation between the conductor and him in the presence of other passengers, and the Supreme Court held that it was for the jury to decide whether they amounted to an indignity; and also held that the trial judge properly charged that the measure of damages, aside from damages for the indignity, was the value of the ticket. The judgment in that case, however, was reversed on other grounds, and, on

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a review of a judgment for the plaintiff on a second trial, the Supreme Court adhered to the rule laid down in the former case as to the measure of damages. *Harris v. Delaware, Lackawanna and Western Railroad Co.*, 82 N. J. L. 456, 457. And this judgment was affirmed. *Ibid.* 458. The only question as to damages argued in this court, in that case, apparently was, as to whether or not the charge permitting recovery for indignity and ignominy was correct. It must have been conceded that in the absence of the infliction of indignity the measure of damage was the value of the ticket. And that, in our opinion, is the law.

Now, as already shown, the case at bar differs from that of *Harris v. Delaware, Lackawanna and Western Railroad Co.*, *supra*, in this, that in the latter there was evidence of indignity, while in the former—the one under discussion—there was no such evidence. Therefore, the damages in this case should have been limited to the value of the ticket in question at the time it was taken up.

The judgment must be reversed to the end that a *venire de novo* may be awarded.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

HORACE F. RUGGLES, PLAINTIFF-RESPONDENT, v. OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, DEFENDANT-APPELLANT.

Submitted April 5, 1916—Decided June 19, 1916.

1. A trial judge, sitting as a traverse jury, is only obliged to decide questions concerning which he is requested to make a finding.

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2. It is a settled rule that a party need not be heard on a point not taken or a matter not raised and considered in the court below.

On appeal from the Supreme Court.

For the appellant, *Kalisch & Kalisch*.

For the respondent, *William J. Morrison, Jr.*

The opinion of the court was delivered by

WALKER, CHANCELLOR. This was a suit in the District Court of the Third Judicial District of Bergen county, and tried before the judge without a jury. The action was based on a "residence burglary and theft policy" by the terms of which the plaintiff claimed that he was entitled to damages from the defendant on account of loss sustained by him by reason of his house being burglarized. The policy of insurance was offered in evidence, the burglary was admitted, and it was also admitted that plaintiff gave defendant notice in compliance with the terms of the contract; also the kind and value of the articles stolen were admitted.

The plaintiff and two other witnesses on his behalf were examined, and when the plaintiff rested the defendant rested also. At this juncture motion was made on behalf of the defendant for the court "to direct a verdict"—meaning, of course, to give judgment, there being no jury—for \$100 in favor of the plaintiff and against the defendant on the ground that the policy named in its proviso toward the bottom "that should the house be left untenanted or unoccupied for a period of eighty-four hours, that in case of any loss the assured may recover \$100." This motion was denied, and judgment was given for the plaintiff for \$362, the admitted value of the articles stolen. The Supreme Court, therefore, very properly held that the only question raised was the denial of the motion to direct a verdict for \$100, or more properly speaking, giving judgment for \$100. That court's *per curiam* reads as follows:

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"The only legal question raised is: Did the trial judge err in denying defendant's motion to direct a verdict for \$100 in favor of the plaintiff and against the defendant on the ground that the policy (of insurance) names in its proviso towards the bottom, 'that should the house be left untenanted or unoccupied for a period of eighty-four hours, that in case of any loss the assured may recover \$100.'

"But upon examination we find that the proviso is by its terms limited in its operation to 'loss of jewelry, precious stones or watches.'

"Since the loss proved related almost if not quite entirely to articles not falling within such description, but which were covered by the policy, it seems clear that there was no error in the denial of the motion in question.

"The judgment will be affirmed, with costs."

The defendant-appellant contends before us that there was a breach of warranty with reference to occupancy, on account of which there should have been a judgment for the defendant, and argues that "if there had been a jury in this case the court would have been bound, irrespective of any motions made in the case, to charge the jury that before judgment could be rendered against the defendant-appellant, they must find that there was no breach of the warranties in the policy of insurance, and if the court were bound to make such a charge, if a jury had been drawn, he is also bound to take the warranties into consideration in giving judgment, when he sits as a jury."

Quite aside from the question as to whether the judge would have been bound to charge, if a jury were present, as claimed in the argument of counsel, without a request for such a charge, it is obvious that the judge, sitting without a jury, was not bound to take the question of warranty into consideration and make a finding thereon, without a specific request therefor. *Blanchard Brothers v. Beveridge*, 86 N. J. L. 561.

In *State v. Shupe*, 88 N. J. L. 610, this court observed that it is a settled rule that a party need not be heard on a point not taken or a matter not raised and considered in the

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court below, referring to the cases in *N. J. Dig. Anno., tit., "Appeal and Error,"* 5 (a).

Coming now to the only meritorious question presented in the record. The request was for a judgment in favor of plaintiff because in the policy there was a *proviso* that should the house be left untenanted or unoccupied for a period of eighty-four hours, in case of any loss, the insured might recover \$100. The house was left unoccupied for a period of five days, and if it had appeared that the loss was of jewelry, precious stones or watches exclusively, the defendant, who moved for the judgment against itself, would have been entitled to have no greater amount assessed against it than the sum named; but, as the Supreme Court said in its *per curiam*, the loss proved related almost, if not quite entirely, to articles not falling within such description. Therefore, it is clear, as concluded by the Supreme Court, that there was no error in the denial of the motion in question.

Let the judgment be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

MARGARET SCHREIBER, RESPONDENT, v. PUBLIC SERVICE RAILWAY COMPANY, APPELLANT.

Argued March 13, 1916—Decided June 19, 1916.

1. A request which would exclude from the consideration of the jury any question of negligence on the part of defendant in stopping its car in a certain place, and of such negligence being a producing cause of accident to plaintiff, was rightly refused, as the jury were justified in finding for plaintiff even though not satisfied that the car started while she attempted to

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board it, there being evidence to support the conclusion that the accident resulted from the stopping of the car in a place of danger and that it was not contributed to by any neglect on the part of the plaintiff to use care for her own safety.

2. The rule which does not permit a party to impeach one of her own witnesses does not preclude her from proving the truth of any particular fact by competent testimony in direct contradiction of that to which any of the witnesses called by her may have testified; and a party testifying is in the same position in this regard as that of any witness not a party, and a jury may well conclude that a party had made a mistake as to a fact as well as any other witness, and if upon the whole matter the jury is of opinion that the plaintiff or defendant has proved the case, then the verdict should be for that party, although it rests upon testimony contrary to that given by the party and despite the fact that the party gave testimony which might preclude a recovery, as the mistake of a plaintiff or defendant cannot change facts proved by other witnesses.
3. Assuming that a request that the plaintiff must satisfy the jury by a preponderance of the testimony that an accident happened as she described, referred to all the evidence adduced on her behalf, and was therefore good, nevertheless an addition in the request that if the accident happened in any other way than as testified to by the plaintiff herself, she cannot recover, is erroneous.
4. Where an instruction asked for is partly good and partly bad, it is proper to refuse it altogether; and it is not error to refuse to charge a request containing several propositions, if any of them are unfounded.

On appeal from the Supreme Court.

For the appellant, *Lefferts S. Hoffman, Leonard J. Tynan*
and *George H. Blake*.

For the respondent, *Alexander Simpson*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. The plaintiff sued to recover damages for injuries received by her while attempting to board a trolley car of the defendant company in Jersey City. A verdict passed for plaintiff and defendant obtained a rule to show cause why it should not be set aside, reserving an exception to a request to charge the jury as follows:

"The plaintiff claims that while the car was standing still

she attempted to board it, and while she had one foot on the running board the car started and threw her into a trench. She must satisfy you by a preponderance of the testimony that the accident happened as she described, and if it happened in any other way than as testified by her she cannot recover."

The rule to show cause was discharged, and the judgment entered on the verdict was appealed to the Supreme Court and there affirmed in a *per curiam*, in which that court said that:

"The purpose of the request was to exclude from the consideration of the jury any question of negligence on the part of the defendant company in stopping its car alongside of this trench, and of such negligence being a producing cause of the accident to the plaintiff. We think the court rightly refused to take this question from the jury, for they were justified in finding a verdict in favor of the plaintiff, even though they were not satisfied that the car started while she was attempting to board it, if the evidence supported the conclusion that the accident resulted from the stopping of the car in a place of danger, and was not contributed to by any neglect on the part of the plaintiff to use care for her own safety."

In our opinion the decision by the Supreme Court was right, but we think affirmance of the judgment should also be rested on additional ground.

Even if the request that the plaintiff must satisfy the jury by a preponderance of the testimony that the accident happened as she described, may be construed to mean as described in the testimony *generally* adduced on her behalf, and not as *she herself* in her testimony alone described the accident, no such construction can be placed upon the other part of the request, which was, that if the accident happened in any other way than as testified to by the plaintiff she could not recover. This idea was doubtless borne of an erroneous conception of the rule which does not permit a party to impeach one of her own witnesses. The rule does not preclude a party

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from proving the truth of any particular fact by competent testimony in direct contradiction of that to which any of the witnesses called by her may have testified. *Ingersoll v. English*, 66 N. J. L. 463. See also *Kaufman v. Bush*, 69 *Id.* 645; *Hayward v. North Jersey Street Railway Co.*, 74 *Id.* 678; *Moebius v. Williams*, 84 *Id.* 540; *State v. Kubaszewski*, 86 *Id.* 250, 255.

We think that no reason can be assigned which would put a *party* giving testimony in any other position in *this regard* than that of a *witness not a party*; and a jury might well conclude that a *party* has made a mistake as to a fact as well as any other *witness*, and, therefore, if upon the whole matter the jury is of opinion that the plaintiff or defendant has proved the case, then the verdict should be for that party, although it rests upon testimony contrary to that given by the party, and despite the fact that the party gave testimony which, standing alone, might preclude a recovery. The mistake of a plaintiff or defendant cannot change facts proved by other witnesses.

Assuming that the request that the plaintiff must satisfy the jury by a preponderance of the testimony that the accident happened as she described, referred to all the evidence adduced on her behalf, and was therefore good, nevertheless, the addition in the request that if the accident happened in any other way than as testified to by the plaintiff herself, she cannot recover, was erroneous. And where an instruction asked for is partly good and partly bad, it is proper to refuse it altogether. *Dederick v. Central Railroad Co.*, 74 N. J. L. 424. It is not error to refuse to charge a request containing several propositions, if any of them are unfounded. *Consolidated Traction Co. v. Chenowith*, 58 *Id.* 416, 419.

The judgment under review will be affirmed.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, TERHUNE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

**THE STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
WILLIAM HEYER, PLAINTIFF IN ERROR.**

Argued November 23, 1915—Decided June 19, 1916.

1. When a defendant pleads guilty to a criminal offence charged in an indictment—or an allegation when that is preferred upon indictment being waived—he cannot avoid the consequences of his plea and reverse the judgment entered upon it by showing that the preliminary complaint before the magistrate recited a name as that of his accuser other than that in the indictment or allegation, and also because the complaint was signed with still another name—being neither the one in the caption of the complaint nor the one used in the indictment or allegation; and especially so when no such question was raised in the trial court.
2. To aver that a man forcibly and against the will of a female did carnally know her, is the same as to aver that he carnally knew her forcibly and against her will. There is no statute or rule of law prescribing the order in which these collocations of words shall precede and follow one another in an indictment or allegation.
3. In an indictment or allegation for rape it is not necessary to charge that the offence was committed forcibly and against the will of the woman. It is sufficient if it charges that the defendant feloniously did ravish and carnally know her.
4. An allegation for rape (indictment being waived) examined and held, construing its several phrases together and reading them in connection with one another, that, in fact, it charges the defendant with carnal knowledge of a certain woman forcibly and against her will.
5. A question not presented and argued in the court below will be held to have been waived and abandoned, and will not be considered in an appellate tribunal.
6. A person accused of crime is not entitled to the benefit of counsel to advise him as to whether or not he shall confess, but only for defence, and when the record in a criminal case does not disclose whether the defendant was of ability to procure counsel or whether he requested that counsel be assigned to him, it will be assumed that he failed to invoke the privilege.
7. When a person who is charged with an offence triable before the Court of Quarter Sessions, waives indictment and trial by jury and requests to be tried immediately before the court, it is not necessary for the judge to sign an order in writing for the trial of the accused.

On error to the Supreme Court.

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For the plaintiff in error, *William R. Wilson*.

For the defendant in error, *Alfred A. Stein*, prosecutor of the pleas, and *Martin P. O'Connor*, assistant prosecutor of the pleas.

The opinion of the court was delivered by

WALKER, CHANCELLOR. The record in this case discloses a conviction of the defendant of the crime of rape upon his plea of guilty. He brings error and makes numerous assignments; those only which go to the record being available to him, as no exceptions were taken in the progress of the cause in the trial court.

It is contended that the judgment is invalid because in the complaint it was recited that it was made by *Annie Atam-cuk*, but was signed by *Anna Atamacuk*. The defendant waived trial by indictment and the prosecutor, by virtue of the statute, preferred an allegation against him charging the commission of rape upon *Anna Starncuk*. Counsel argues that these variances are fatal. This is not so, at least for this reason: the defendant, when arraigned to plead upon the allegation which charged him with having committed a rape upon *Anna Starncuk*, pleaded guilty, and for this offence, namely, rape upon *Anna Starncuk*, so preferred against him, he was by the court adjudged guilty upon his plea, and sentenced.

When a defendant pleads guilty to a criminal offence charged in an indictment—or an allegation when that is preferred upon indictment being waived—he certainly cannot avoid the consequences of his plea and reverse the judgment entered upon it, by showing that the preliminary complaint before the magistrate recited a name as that of his accuser other than that in the indictment or allegation, and also because the complaint was signed by still another name—being neither the one in the caption of the complaint nor the one used in the indictment or allegation; and especially so when no point of it was made in the trial court.

It is next contended that the allegation does not charge rape, but only assault and battery, for which the defendant was not tried. He had no trial because he pleaded guilty. If the objection that rape was not charged were valid, and if it were to be held that the conviction could be sustained for assault and battery, the sentence imposed—the maximum of which was for rape—could be corrected here or sent to the court below for that purpose. *State v. Huggins*, 84 N. J. L. 254.

The pertinent language of the allegation is this: "that the said William Heyer on the twenty-sixth day of November, in the year of our Lord nineteen hundred and thirteen, at the city of Elizabeth, in the county aforesaid, and within the jurisdiction of this court, then and there being, did feloniously and forcibly and against the will of one Anna Starncuk, a woman, make an assault upon the body of her the said Anna Starncuk, and did then and there feloniously ravish and carnally know her the said Anna Starncuk."

Rape at common law is defined by Blackstone as "the carnal knowledge of a woman forcibly and against her will." 4 *Black. Com.* 210.

Our Crimes act (*Comp. Stat.*, p. 1783, § 115) provides that "any person who shall have carnal knowledge of a woman forcibly against her will," shall be guilty of a high misdemeanor. There is here no departure from Mr. Justice Blackstone's definition. The only difference between these definitions and the terms employed to charge the crime in the allegation in the case at bar is, that in the Commentaries the phrase is "forcibly *and* against her will" and in the statute it is "forcibly against her will," both following the words "carnal knowledge of a woman," while in the allegation the words "forcibly and against the will of," &c., precede the words "and did then and there feloniously ravish and carnally know her," &c.

To aver that a man forcibly and against the will of a female did carnally know her, is the same as to say that he carnally knew her forcibly and against her will. There is no

statute or rule of law prescribing the order in which these collocations of words shall precede and follow one another in an indictment or allegation.

It is, however, contended that because the allegation avers that the defendant "did feloniously and forcibly and against the will of Anna Starncuk, a woman, make an assault upon the body of her the said Anna Starncuk," that, notwithstanding the immediately following words, "and did then and there feloniously ravish and carnally know her the said Anna Starncuk," it only charged an assault and battery, because the words "forcibly against her will" precede the averment of the assault and battery, neither immediately preceded nor followed the charge of ravishment and carnal knowledge, which latter charge was written after a comma, and that, therefore, the ravishment and carnal knowledge is not averred to have taken place forcibly and against the will of the woman.

The phrases just quoted are all part of the context of a single sentence, and the sentence is not to be defeated as a criminal pleading if it can rationally and reasonably be construed to charge an offence which, apparently, it was intended to charge. When the pleader said that the prisoner did feloniously ravish and carnally know the woman he undoubtedly meant to charge rape.

In 1 *Bouv. L. Dict. (Rawles' Rev.)* 654, in defining "context" it is stated:

"It is the general principle of legal interpretation that a passage or phrase is not to be understood absolutely as if it stood by itself, but is to be read in the whole of the context, i. e., in its connection with the general composition of the instrument. * * * It not unfrequently happens that two provisions of an instrument are conflicting; each is then the context of the other, and they are to be taken together and are understood as to harmonize with each other so far as may be, and to carry out the general intent of the instrument."

As before remarked the phrases under consideration are all within a single sentence, and, it seems to us, when it was charged that the defendant did feloniously and forcibly and

against the will of the woman make an assault upon her body and did then and there feloniously ravish and carnally know her, a single offence was charged, that is, a ravishment and carnal knowledge of the body of the woman which was necessarily involved in an assault upon her. Besides, the word "ravish" in and of itself necessarily implies force. So that, even conceding that the charge of a felonious assault against the will of the woman, followed by an averment that she was then and there forcibly ravished and carnally known, restricted the charge to an offence against her will to that of an assault upon her only, nevertheless, subsequent averments that she was then and there feloniously ravished and carnally known, necessarily imply that the ravishment and carnal knowledge was accomplished forcibly and against her will. The word "ravish" is defined in *Webs. New Int. Dict., inter alia*, "to have carnal knowledge of a woman by force and against her will." And, moreover, the words "feloniously did ravish and carnally know" imply that the act was done forcibly and against the will of the woman. This was expressly decided in *Harman v. The Commonwealth*, 12 *Serg. & R. (Pa.)* 69, wherein Chief Justice Tilghman said (at p. 70), speaking of one of the assignments of error in that case:

"The second is, that the offence is not charged, in the indictment, to have been committed, *forcibly and against the will* of the woman. The expressions are, '*that he feloniously did ravish, and carnally know her.*' I am of opinion, that this is sufficient. The word *ravish* implies force and violence in the man, and want of consent in the woman. That the indictment need not aver, that the rape was committed *against the will of the woman*, seems to be the opinion of authors of the highest authority. Lord Hale, in enumerating the essential parts of the indictment, says, that it must contain the words, *felonice rapuit* and *carnaliter cognovit*. 1 *Hale* 632. Hawkins thinks that the rape is sufficiently ascertained, by the words *felonice rapuit*, without adding *carnaliter cognovit*. *Hawk., bk. 2, ch. 25, § 56*. Chitty, one of the latest writers on criminal law, says, the indictment must charge the offence

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to have been committed feloniously, and contain the technical word *ravished*. Whether it must also charge, that the defendant had *carnal knowledge* of the woman, he considers doubtful, but advises the insertion of those words. 3 *Chit. Crim. L.* 812. East, in his treatise on *Criminal Law* (first volume, p. 447), says, the indictment must charge, that the defendant *feloniously ravished her*. It may fairly be concluded, from all these authorities, that the words *against her will*, are not essential; and certainly the word *ravish*, as commonly understood, implies that it was *against her will*."

This decision, based as it is upon the highest authority, clearly shows that in an indictment or allegation for rape it is not necessary to charge that the offence was committed forcibly and against the will of the woman. It is sufficient if it charges that the defendant feloniously did ravish and carnally know her. However, construing the several phrases together, we have no difficulty in holding that the allegation before us, does, in fact, charge the defendant with carnal knowledge of the woman forcibly and against her will.

Counsel insists that defendant's conviction is irregular for the reason that the defendant is a young man and was not represented by counsel, and that the charge being of such a grave nature, if this court thinks it is rape, the lower court should not have permitted him to plead unless represented by counsel. We have been pointed to no authority to the effect that young men should not be permitted to plead guilty to serious offences without the advice of counsel. This suggestion is *aliunde* the record; and it has been repeatedly decided that a question not presented and argued in the court below will be held to have been waived and abandoned and will not be considered in an appellate tribunal. See the cases in *N. J. Dig. Anno.*, tit. "*Appeal and Error*," 5 (a). But if we were called upon to decide whether the defendant was entitled to counsel to advise him, a perfect answer would be found in *State v. Murphy*, 87 N. J. L. 515, wherein it was held that one accused of crime is not entitled to the benefit of counsel to advise him as to whether or not he shall confess,

but only for defence, and that when the record in a criminal case does not disclose whether the defendant was of ability to procure counsel or whether he requested that counsel be assigned to him, it will be assumed that he failed to invoke the privilege. This record is silent on those questions, and as a defendant must at least request the assignment of counsel to defend him, in order to obtain such service, that objection in this case is unavailing.

It is stated that defendant applied to be tried in the Court of Quarter Sessions, but that no order was made for his trial in that court, and that he was arraigned before the judge of the Court of Common Pleas constituting the Court of Special Sessions, not sitting as a judge of that court, pleaded, was adjudged guilty and sentenced, &c. And this is asserted to be legal error.

The allegation of rape against the defendant was entitled in the Court of Special Sessions and the record discloses that at a Court of Special Sessions holden before the judge of the Court of Common Pleas constituting the Court of Special Sessions, the defendant was set to the bar, pleaded guilty and the prosecutor moved for judgment, &c. The contention, therefore, that the defendant pleaded, was convicted and sentenced in the pleas and not in the sessions is merely specious. There appears in the return to the writ of error the form of an order to be made by the judge of the Court of Common Pleas and Court of Special Sessions, ordering a session of the Court of Special Sessions to be held for the trial of the accused to meet at the court house in Elizabeth on December 5th, 1913. That is the day when the plea was taken and the judgment entered. The form of order was not signed. The Criminal Procedure act (*Comp. Stat.*, p. 1824, § 12) provides that the judge of the Court of Common Pleas of each county shall constitute a Court of Special Sessions in and for such county. And section 13 provides that when any person is charged with an offence triable before the Court of Quarter Sessions, and the accused shall in writing signed by him, addressed to the prosecutor, waive indictment and trial by jury

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and request to be tried immediately before the Court of Special Sessions, it shall be the duty of the prosecutor to report such fact to the judge of the Court of Special Sessions and unless the judge of that court shall deny such request, he shall, with all due and reasonable speed, proceed to hold a session of the Court of Special Sessions and try the person so charged, and determine and adjudge his guilt or innocence. There is no requirement that the judge shall make and sign an order in writing for the trial of an accused waiving an indictment and pleading to an allegation. That the defendant had notice of the time and place of trial in this cause is shown by the fact that he appeared and pleaded. There is nothing in the objection that a formal order should have been made.

This disposes of all the questions presented by the record, and, there being no error, the judgment must be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, PARKER, MINTURN, KALISCH, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 11.

For reversal—None.

THOMAS A. CLAY, APPELLANT, v. THE CIVIL SERVICE COMMISSION AND J. ALEXANDER BROWNE, RESPONDENTS.

Argued March 20, 1916—Decided June 27, 1916.

1. An order of the Civil Service Commission, attempting to adjudicate the title to an office, is absolutely void, and in legal contemplation is as inoperative as if it had never been promulgated. Consequently, such an order is not a proper subject of review by writ of *certiorari*.
2. Where the Civil Service Commission wrongfully refuses to certify a payroll, the remedy for such wrongful refusal is not a writ of *certiorari* to test the soundness of the reasons upon which such refusal is based, but an application for *mandamus* to compel the board to perform the duty imposed upon it by statute.

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On appeal from a judgment of the Supreme Court, whose opinion is reported in 88 N. J. L. 502.

For the appellant, *William I. Lewis*.

For the Civil Service Commission, *John W. Wescott*, attorney-general, and *Josiah Stryker*.

For J. Alexander Browne, *Ward & McGinnis*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. This is an appeal from a judgment of the Supreme Court dismissing a writ of *certiorari* sued out by Dr. Clay for the purpose of reviewing a proceeding of the Civil Service Commission relating to the matter of his appointment as health officer of the board of health of the city of Paterson. This proceeding was instituted at the request of Dr. Browne, who contended that he was the *de jure* health officer of Paterson and that Dr. Clay had wrongfully usurped that position. It consisted of an investigation of the rights of these two physicians with relation to the position and of the following conclusion spread upon the minutes of the board: "The appointment of Dr. Clay, which in effect was a dismissal of J. Alexander Browne, M.D., who had hitherto held the position, was illegal and contrary to the provisions of the civil service law. It is therefore ordered that Dr. Browne be reinstated to the position of health officer, from which he has been illegally ousted."

The judgment of the Supreme Court dismissing the writ was rested upon the conclusion that the appointment of Dr. Clay to the position of health officer was without warrant of law; that Dr. Browne was legally entitled to hold that position, and that consequently no legal injury was done to Dr. Clay by the order made by the Civil Service Commission of which he complains.

We are entirely satisfied that the writ of *certiorari* was properly dismissed by the Supreme Court; but we do not base our conclusion upon the grounds given by that court for

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its action. Dr. Clay insists that the action of the Civil Service Commission was an adjudication of the title to the position of health officer. The respondents insist that it was a mere expression of opinion with relation to the matter investigated by the board, and did not have and was not intended to have any mandatory force.

It is not necessary to determine which of these contentions is sound, for whether the action complained of be merely the expression of an opinion, or whether it be an attempted adjudication of the rights of the two gentlemen with relation to the position of health officer of Paterson, it is not the proper subject of review by *certiorari*.

If it be considered a mere expression of opinion, it is sufficient for the disposition of the matter to reiterate what was said by Mr. Justice Garrison, speaking for the Supreme Court, in the case of *Newark v. Fordyce et al.*, viz.: "A writ of *certiorari* will not lie to revise or correct erroneous opinions, however hurtful they may be to individuals concerning whom they are expressed. An order, judgment or determination affecting the rights of the prosecutors is necessary as a foundation for the use of the writ." 88 N. J. L. 440.

If, on the other hand, it be considered a formal adjudication by the board of the right of Dr. Browne to continue in the position of health officer and the usurpation by Dr. Clay of that position, such adjudication is absolutely without force. It determines no right; it affords no protection. It is in legal contemplation as inoperative as though it had never been promulgated. It is as much beyond the powers or functions of the Civil Service Commission to adjudicate with relation to the right of either Dr. Browne or Dr. Clay to hold this position as a similar adjudication by a justice of the peace or the overseer of the poor of the city of Paterson, would be outside of the official powers of either one of these officers. To justify the allowance of a writ of *certiorari*, it must appear that the matter sought to be reviewed has at least some semblance of vitality, that as long as it stands it affects some right or interest of the party applying for the writ.

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It is argued on behalf of Dr. Clay that he is injuriously affected by the order of the Civil Service Commission, because, on the basis of the conclusion reached by it and expressed therein, the board has refused to certify a payroll containing provision for the payment to him of the compensation to which he is entitled as the health officer of the city of Paterson, either *de jure* or *de facto*. But his remedy for the wrongful refusal of the Civil Service Commission to certify the payroll (if such refusal be wrongful) is not the suing out of a *certiorari* to test the soundness of the grounds upon which that refusal was rested, but an application for a *mandamus* to compel the performance by the board of a legal duty which the statute of its creation has imposed upon it. *Comp. Stat.*, p. 3805, § 82.

The judgment under review will be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 12.

For reversal—None.

JOHN H. DOREMUS ET AL., RELATORS, APPELLANTS, v.
THE BOARD OF CHOSEN FREEHOLDERS OF THE
COUNTY OF PASSAIC, RESPONDENT.

Argued November 30, 1915—Decided June 19, 1916.

1. The mere ownership of a proposed armory site gives no standing to the owner to invoke the aid of a writ of *mandamus* to compel the board of freeholders to raise, by a bond issue, moneys to pay the purchase price of land which the state military board, under the power conferred by *Pamph. L.* 1913, p. 502, has contracted to purchase.
2. The right of a citizen to the issue of a prerogative writ is only recognized when it is apparent that the public convenience, or interest, will be subserved by the remedy desired.

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3. By the statute creating the state military board (*Pamph. L.* 1913, p. 502), that board is made the state's agent with discretion to determine the advisability of acquiring lands for armory purposes, the place of erection, the price to be paid for it, the character of the building to be erected on it, and to supervise the construction of the same. The right to enforce the obligation of the board of chosen freeholders to issue bonds to raise the money necessary to pay for such armories rests, therefore, in the state board and not in any private citizen who may see fit to interest himself in the matter.
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On *mandamus*. On appeal from a judgment of the Supreme Court, whose opinion is reported in 86 N. J. L. 108.

For the appellants, *Nelson B. Gaskill* and *Whitehead & Appleton*.

For the respondent, *Jacob W. De Yoe* and *Frederick W. Van Blarcom*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The appellants sued out of the Supreme Court an alternative writ of *mandamus* calling upon the board of freeholders to show cause why it should not be compelled to raise by a bond issue, certain moneys to pay the purchase price of four contiguous tracts of land in the city of Passaic owned by the appellants, and which the state military board had contracted with them to acquire for an armory site; the right to acquire the lands for that purpose having been conferred upon the state military board by the legislative act of April 7th, 1913. *Pamph. L.*, p. 502.

Upon demurrer to the writ the Supreme Court held that the obligation of boards of freeholders to issue bonds for the purchase of armory sites did not clearly appear from the statute, and for this reason directed judgment for the respondent.

We think the judgment of the Supreme Court should be affirmed, but we prefer to put our decision upon a ground other than that declared in the court below.

The appellants claimed the right to prosecute the writ, first, as the owners of the lands contracted for, and second, as members of a class of persons directly affected by the erection and maintenance of an armory in the city of Passaic.

If they are not entitled to prosecute the writ under either the one right or the other, then, although their standing as relators was not challenged in the Supreme Court, yet if their lack of legal interest in the controversy which the proceedings present affirmatively appears, this court should not only refuse to consider the meritorious questions involved, but should direct a dismissal of the proceedings, although that course had not been followed by the court out of which the writ issued. *Avon v. Neptune City*, 57 N. J. L. 701; *West Jersey Traction Co. v. Camden*, 58 Id. 362.

The duty of the board of freeholders to issue bonds for the purpose of raising money to pay for an armory site, if it exists at all, is one which it owes to the people at large, and not a private obligation resting upon it solely for the benefit of the landowners whose property is sought to be acquired. In such a posture of affairs, *i. e.*, where the object sought is the prevention of a public wrong by a public body, or the enforcement of a public duty by such body, courts will not, at the instance of a private party, act by *mandamus*, unless the applicant is one of a class of persons to be most directly affected in their enjoyment of the public right by the wrongful action or non-action of the public body. *Ferry v. Williams*, 41 N. J. L. 332, 339; *Oliver v. Jersey City*, 63 Id. 96, 98; *S. C. on error*, Id. 634; *Bott v. Secretary of State*, Id. 289, 299. It is obvious, therefore, that the mere ownership of the proposed armory site gives to the relators no standing to invoke the aid of the prerogative writ of *mandamus* for the purpose for which they seek it.

Nor do we think that they have standing to prosecute the writ as members of a class of persons most directly affected by the erection of an armory in the city of Passaic for the housing of a portion of the National Guard of the state.

The purpose of the statute of 1913 is the acquisition of lands and the erection of an armory thereon for the benefit

of the state at large, and not merely for the benefit of the people of Passaic, or of the county in which that city is located. The statute provides that the title to the land, when acquired, shall vest in the state, and that the cost of the erection of the armory upon it shall be paid out of state funds. It follows, therefore, that neither the citizens of the city, nor those of the county of Passaic, constitute a class of persons "most directly affected in their enjoyment of a public right by the refusal of the board of freeholders to issue the bonds in question." But this fact is not controlling, for in *Bott v. Secretary of State*, *supra*, it was held that the doctrine of *Ferry v. Williams* and *Oliver v. Jersey City* was applicable not only to public bodies or officers whose official sphere was confined to some political division of the state, but applied to those whose official action affected the whole state equally (see page 299 of opinion), and as a result of this view, declared that any voter in the state whose elective franchise had been injuriously affected by illegal regulations controlling an election on the question of adopting proposed constitutional amendments, could challenge the validity of that election by *certiorari* proceedings. That the doctrine applies equally to proceedings by *mandamus* or *quo warranto* is also declared by this court in the opinion just cited.

The right of the present relators to prosecute this action, therefore, depends upon whether or not the legislature, by implication, declared that this common law rule should not be applicable in determining whether or not boards of freeholders should be proceeded against by *mandamus* for failure to issue bonds in compliance with the requisition of the state military board. We think that it has. A reference to the cases already cited will show that the right of the citizen to the issue of a prerogative writ is only recognized when it is apparent that the public convenience, or interest, will be subserved by the remedy desired. By the statute the state military board is created the state's agent with discretion to determine whether or not land shall be acquired in any county for armory purposes, and if so, in what part of the county; the price to be agreed upon; the character of the armory to be erected,

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and the supervision of its construction, and in all these matters the judgment of the state military board is to be final. If in a given case the board of freeholders of a county refuses to honor the requisition of the state military board by the issuing of bonds for the purchase of an armory site, the question immediately arises whether this refusal has any basis of justification in fact; and the purpose of the legislature exhibited in the statute is that this and like questions shall be determined by the state military board, and not by a mere citizen of the state who sees fit to interest himself in the matter. The failure of the state military board to take proceedings to enforce the obligation of the board of freeholders to issue the bonds raises the presumption that further investigation has satisfied it that the public interest will not be subserved by an application for a writ of *mandamus* directed against the board of freeholders. It is not within the province of the ordinary citizen to disregard this conclusion of the board, and attempt to override it by seeking to become an actor in its place and stead.

For these reasons we think the judgment of the Supreme Court should be affirmed.

For affirmance—THE CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 11.

For reversal—None.

CHARLES HETZEL, JR., BY NEXT FRIEND, APPELLANT, v.
WASSON PISTON RING COMPANY, RESPONDENT.

Submitted March 27, 1916—Decided June 19, 1916.

In enacting the Workmen's Compensation act and declaring that every contract of hiring made subsequent to its going into effect shall be presumed to have been made with reference to the act, &c.,

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the legislature must have had in mind contracts which were valid in law, or at least contracts which were not prohibited by statute; hence, where an infant thirteen years of age was employed in a factory, in direct contravention of the provisions of chapter 64 of the laws of 1904 (*Pamph. L.*, p. 152), and was injured while so employed, the scheme of compensation provided by the Workmen's Compensation act in nowise applies, and the common law liability of the employer to compensate the employe for injuries alleged to have been caused by the negligence of the master is not affected thereby.

On appeal from the Hudson Circuit Court.

For the appellant, *Harlan Besson*.

For the respondent, *Kalisch & Kalisch*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The plaintiff, an infant thirteen years of age, was employed in the factory of the defendant company, in which the manufacture of piston rings and other metallic articles was carried on. The present action is based upon the common law liability of an employer to compensate an employe for injuries received in his employment by reason of the negligence of the master. The defendant moved to strike out the complaint filed in the case upon the ground that, since the enactment of the statute of April 4th, 1911, commonly known as the Workmen's Compensation act (*Pamph. L.*, p. 134), the common law liability of the master under the conditions recited has been abrogated, and the scheme of compensation provided by that act, and the extent of the owner's liability set out therein, have been substituted; and that, consequently, the exclusive remedy of the plaintiff in the present case is that which has been provided by the statute. The Circuit Court, conceiving that the ground of the application to strike out was well founded, held that the defendant was entitled to its motion, and from the judgment entered upon that ruling the plaintiff now appeals.

The Workmen's Compensation act declares that every contract of hiring made subsequent to the time of its going into effect shall be presumed to have been made with reference to the provisions of the act, and the parties to the contract shall be presumed to have accepted them, unless written notice to the contrary is given by one of the contracting parties to the other; and that in the employment of minors the act shall be presumed to apply, unless the written notice shall be given by or to his parent or guardian.

It can hardly be doubted that the legislature, in providing for the engrafting of these statutory provisions on contracts of hiring, had in mind contracts which were valid in law, or, at least, contracts the making of which was not prohibited by express legislative enactment; for it would be entirely unreasonable to attribute to the legislature the intention of adding terms to a contract of hiring which it had already prohibited the parties thereto from making.

Was, then, the contract in the present case a valid one?

A mere reference to chapter 64 of the laws of 1904 (*Pamph. L.*, p. 152) furnishes a complete answer to this query. This act regulates the age, employment, safety and work hours of persons employed in factories, workshops, mills and all places where the manufacture of goods of any kind is carried on, and its first section is that "No child under the age of fourteen years shall be employed, allowed or permitted to work in any factory, workshop, mill or place where the manufacture of goods of any kind is carried on; any corporation, firm, individual, parent or guardian of any child who shall violate any of the provisions of this section shall be liable to a penalty of \$50 for each offence." The basis of the judgment below is that there was a contract of hiring by which the plaintiff became the employe of the defendant. That there was such a contract, either express or implied, clearly appears from the facts set out in the plaintiff's complaint. That the contract was in violation of this statute, and that the making thereof was absolutely prohibited thereby,

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cannot be questioned; for it will hardly do to say, as is suggested by counsel, that the employer and the parent of the minor can by joint agreement deprive the child of the protection of this statute by a payment of \$50 as a penalty for a violation of its provisions. The purpose of the statute cannot be thwarted in any such way. Its primary object is the protection of children who are too young to appreciate the dangers arising out of work in places such as those described in the act. And in order to make that protection complete the legislature left no loophole for the escape from its provisions of either the employer or the parent. It says to the employer, "You shall not employ any child under the age of fourteen years in your factory; you shall not allow or permit him to work there." It says to the parent of such a child, "You shall not allow or permit your boy or girl to work in such a place until he or she has reached the age of fourteen years." Having declared this absolute prohibition, how can it logically be said that the legislature, by a subsequent enactment, recognized the right of the factory owner and the parent to disregard the mandate of this statute, and make a contract for the employment of the boy which might or might not have read into it the provisions of the Workmen's Compensation act, as the master and the parent between them should elect?

It is said that there is nothing in the complaint which shows that the contract of hiring was made by the parent on behalf of the plaintiff, and not by the plaintiff himself. It is not necessary that this should appear. Ordinarily the parent is entitled to the services of the child, and the wages earned by the child, until he reaches his majority, and so contracts for the employment of the child are presumed to be made by the parent. But in this particular case it is immaterial whether the contract was that of the parent for the child, or of the child by his own act; for the prohibition of the act of 1914 is not only against the making of contracts for the employment of minors under the age of fourteen in

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factories where the manufacture of goods is carried on, but against allowing or permitting him to work in any such factory; and so a contract of hiring which by its terms proposes to violate that act, is equally invalid whether made by the parent or by the child.

We conclude, therefore, that the common law right of action of the plaintiff arising out of the facts set out in his complaint has not at all been affected by the provisions of the Workmen's Compensation act, and that, therefore, the judgment under review must be reversed.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 16.

CHARLES HETZEL, SR., APPELLANT, v. WASSON PISTON RING COMPANY, RESPONDENT.

Submitted March 27, 1916—Decided June 19, 1916.

A father who has allowed his son, under the age of fourteen, to work in a factory in violation of the statute prohibiting the employment of children under the age of fourteen in factories, cannot recover from the employer damages resulting from injuries received by the son which arose out of the employment.

On appeal from the Hudson Circuit Court.

For the appellant, *Harlan Besson*.

For the respondent, *Kalisch & Kalisch*.

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The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The plaintiff in the present case seeks to recover from the defendant expenses which he was compelled to pay for the treatment of injuries received by his son, Charles Hetzel, Jr., while engaged at work in the factory of the defendant company, and resulting from the negligence of the defendant, and also compensation for the loss of his son's services resulting from the accident. Having filed his complaint, counting on this alleged common law liability of the defendant, application was made to strike it out upon the ground that the only obligation of the master to make compensation for injuries received by plaintiff's son was that declared by the Workmen's Compensation act, and that the right of recovery, if it existed, could only be enforced by the proceeding provided by that act. The court below, conceiving this contention to be well founded, struck out the complaint, and directed the entry of judgment for the defendant.

We think the ground upon which the judicial action complained of was based is untenable. The reasons for this conclusion are set out at length in an opinion promulgated by us at the present term in the case of Charles Hetzel, Jr., against the same defendant.

The judgment, however, can and should be sustained upon another ground. Chapter 64 of the laws of 1904 (*Pamph. L.*, p. 152), the object of which is to regulate the age, employment, safety, &c., of employes and operatives in factories where the manufacture of goods of any kind is carried on, declares in its first section that "No child under the age of fourteen years shall be employed, allowed or permitted to work in any factory, workshop, mill or place where the manufacture of goods of any kind is carried on; any corporation, firm, individual, parent or custodian of any child who shall violate any of the provisions of this act shall be liable to a penalty of fifty dollars for each offence." It appears in the plaintiff's complaint that his son was injured while at work in the defendant's factory; that this factory was devoted to the manufacture of piston rings, and other metallic articles, and that the boy was thirteen years of age at the time when

he received his injury. It is apparent, therefore, that in setting this boy to work in the defendant's factory there was a deliberate violation of the provisions of the act of 1914, the purpose of which was to protect just such little ones from injuries which might result from their entire inability to appreciate the dangerous conditions under which they were working. The statute not only prohibits the factory owner from employing children under the specified age, but it prohibits the parent or custodian of the child from allowing or permitting the child to work in such a place. It does not appear for how long a time this little boy was engaged at work in the defendant's factory before the injuries were received by him which are made the foundation of this suit, but it can hardly be supposed that he was engaged at work there without the knowledge and consent of his father. Moreover, as a rule of pleading, it is to be presumed to the contrary, that is, that he was there with such knowledge and permission, for in order to entitle him to recover in the present action, the burden rests upon the father to show that the injury which came to his son was not to any extent the result of any violation of law on his part, and his failure to negative in his complaint the fact that he was a consenting party to his son's employment requires the fact to be concluded against him.

The injury of the plaintiff's son is the direct result of the joint violation of the act of 1904 by the defendant and the plaintiff, and the stripping of the child of that protection which the legislature by that statute declared he should have.

The plaintiff can take nothing by way of compensation for a loss which has come to him as the direct result of his own violation of law, and for this reason the judgment under review should be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 16.

For reversal—None.

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**SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES,
RESPONDENT, v. CITY OF PATERSON, APPELLANT.**

Argued March 14, 1916—Decided July 6, 1916.

1. The taxes required to be raised by the General School law for the support of the free public schools of the state are state taxes levied for the use of the state.
2. Property acquired by the Society for Establishing Useful Manufactures under an act entitled "An act to develop and improve the water power of the Passaic river" (*Pamph. L. 1868, p. 545*), is not exempt from local taxation under the provisions of the society's charter. *Pat. L., p. 104.*

On appeal from the judgment of the Supreme Court, whose opinion is reported in 88 N. J. L. 123.

For the appellant, *Edward F. Merrey* and *Francis Scott*.

For the respondent, *John B. Humphreys*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The question presented for determination by these proceedings is the validity of certain taxes, assessed upon real estate of the Society for Establishing Useful Manufactures, for the year 1914, by the taxing officials of the city of Paterson. These taxes were laid, partly for city purposes, partly for county purposes and partly for the support of the public schools of the state. The society claims that it is exempt from all such taxation by the provisions of its charter; the Supreme Court upheld this contention, and the city has appealed.

The fourth section of the society's charter, which was granted in 1791 (*Pat. L., p. 104*), provides that the real and personal property of the society shall be free and exempt from all taxes, charges and impositions, whether for state or county uses, or for any other use whatsoever; with a proviso that

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the said exemption "as touching the lands, tenements and hereditaments of the said society shall continue in force for the term of ten years only, after which term it shall be lawful to lay such taxes for the use of the state upon the said lands, tenements and hereditaments as shall be laid upon other lands, tenements and hereditaments of like value, nature or description."

So far as the taxes under consideration were imposed for city and county purposes, we concur in the determination of the Supreme Court that they were laid in violation of the provision of the society's charter just quoted, except as is hereinafter indicated; and we have nothing to add by way of reasoning to the exposition of this charter provision by that court in the opinion promulgated by it. We disagree, however, with the conclusion expressed by it that the state school tax is assessed for local, and not for state uses, and is, therefore, not within the proviso of the exemption clause of the charter.

For the purposes of this case (regardless of what, in fact, the situation was) it may be conceded that prior to the amendments of the state constitution in 1875, the establishing and maintaining of free public schools were matters of local, rather than state, concern; that is, were left to the determination of the governing bodies of the several political subdivisions of the state. By those amendments, however, the people declared, among other things, that thereafter *the legislature* should "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years." *Const., art. 4, § 7, ¶ 6.* Pursuant to that mandate the legislature enacted a general school law operative throughout the length and breadth of the state which has ever since, with various amendments and revisions, been in force. For the purpose of maintaining these free public schools a sum of money not less than \$100,000 is required to be appropriated annually from the state treasury. In addition to this appropriation a state school tax is re-

quired to be annually assessed "upon the taxable real and personal property in the state as exhibited by the latest abstract of ratables from the several counties, made out by the several boards of assessors, and filed in the office of the state comptroller." The amount of this tax is fixed by legislative mandate, and is such sum as will make, when added to the annual state appropriation, a sum equal to two and three-quarter mills on each dollar of valuation of the taxable real and personal property in the state. This tax is required to be assessed, levied and collected at the same time and in the same manner as local taxes are, and is, when collected, required by the statute to be turned into the state treasury. When the total amount of this state tax is received by the state treasurer, ten per centum is set aside as a reserve fund for the purpose of apportionment by the state board of education, according to its discretion, among the several counties of the state. As to the remaining ninety per cent. the state comptroller is required, upon the order of the state superintendent of public instruction, to remit to each of the county collectors in the state a sum equal to nine-tenths of the money contributed by his county to this state school fund. The moneys so paid to the several county collectors are to be received and held in trust by them, and paid to the custodians of the school moneys of the several school districts of their counties, on the orders of the county superintendent of schools. *Comp. Stat.*, p. 4780-4782.

The argument is that this legislative scheme of taxation exhibits a purpose to raise moneys, not (in the language of the society's charter) "for the use of the state," but for the use of the several school districts of the state; and that such a use is purely local. This argument is rested principally upon two features of the taxing scheme—*first*, the method by which the tax is assessed and collected; *second*, the return of ninety per cent. of it to the various counties from which it was received.

In our opinion the method of assessment and collection throws no light upon the character of this tax. Up to the

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time of the enactment of the "Act for the taxation of railroad and canal property," in 1884, and of the "Act to provide for the imposition of state taxes upon certain corporations and for the collection thereof," passed the same year, the expenses incurred in carrying on the state government were met largely by the imposition of an annual state tax, levied upon all of the taxable real and personal property within the territory of the state. The machinery by which that tax was assessed and collected was from the beginning identical with that which is now used for the assessment and collection of the state school tax. A tax which is imposed directly by the legislature upon all the taxable property of the state, the amount of which is declared by that body, and the uses to which it is to be devoted are fixed by it, is a state tax, even though the legislature uses the municipal taxing machinery in the various political subdivisions of the state for its assessment and collection. A local tax is one laid upon property in the locality, by the governing body thereof for an amount fixed by it, and for local governmental uses declared by it. Bearing in mind this distinction we have no doubt that the tax imposed by the legislature for the maintenance and support of our system of free public schools "for the instruction of all the children in this state between the ages of five and eighteen years," is a state and not a local tax.

But it is said that even if the tax be a state, and not a local one, it has not been laid "for the use of the state," within the meaning of that phrase as used in the society's charter. That is to say that, although the tax is laid by the state, it is required to be used for local and not for state purposes. As we have already pointed out, the people of this state, by the amendment to the constitution which we have cited, made the maintenance and support of free public schools a matter of state, instead of local concern. The school tax is laid for the purpose of carrying out this state system of educating our children; it is used for that purpose; and such a use, in our opinion, is as much a state use as the appropriation of moneys to be expended in the support of the

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state government is an appropriation for a state use; the distribution by the state of the moneys so raised, in such a way as, in the judgment of the legislature, would best subserve the purpose of the constitutional mandate being a mere matter of administration.

We conclude, therefore, that so much of the tax under review as was assessed for the support of the free public schools of the state, is a valid obligation which the Society for Establishing Useful Manufactures must discharge.

The tax laid for county and municipal purposes, was not, in our opinion, altogether invalid. In 1868 the legislature of this state passed an act entitled "An act to develop and improve the water power of the Passaic river." *Pamph. L.* 1868, p. 545. The preamble to that act is as follows: "Whereas the Society for Establishing Useful Manufactures, a company incorporated by the legislature of this state, in order more effectually to carry into effect the objects of their incorporation desire to develop, increase and improve the water power of the Passaic river, and by that means extend and increase manufacturing establishments in the county of Passaic, and it appearing that the public good would be promoted thereby; therefore be it enacted," &c. The body of the act empowered the society to develop, increase and improve the water power of the river above the Great falls, and to create ponds or reservoirs of water therein, and in other streams in the county to be used therewith; and to that end erect dams, and raise and increase the height of any dams theretofore erected in the river to such height as they might deem necessary for the purposes authorized "by this act." The statute also authorized the society to acquire, by purchase or condemnation, all lands which would be flooded by the exercise of the powers just referred to, and then declared (in section 6) that "all real and personal property of said society acquired under this act shall be subject to taxation in the same manner as other real and personal property in the city of Paterson is subject thereto."

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It would appear, from the briefs of the counsel both of the state and of the society, that some of the property upon which the taxes in dispute were assessed was acquired by the society under the powers conferred upon it by the act just referred to. The contention of the society is that this property is not taken out of the exemption clause of the original charter by force of the tax provision of the later statute, for the reason that it was acquired by purchase; and that the legislature did not intend that property acquired pursuant to the grant of 1868 should be taxable, unless it was acquired by the exercise of the power of eminent domain. We are told that this is a reasonable construction of the later statute, because (so counsel states) the society could have acquired this property under its original grant, except for the fact that its charter did not confer upon it the power of condemnation. But this statement is based upon a misapprehension of fact; for the seventeenth section of the company's charter confers that power in express terms, although the language used in conferring it is very different from that which has been adopted for the purpose in later days. It appears from the proofs in the cause that some of the property upon which this tax was levied was attempted to be acquired by the society prior to the enactment of the statute of 1868, but that the attempt was unsuccessful for assumed lack of power on the part of the society to compel the owners to part with it. It further appears that it was acquired almost immediately afterwards by purchase, because the owners realized that by this legislation they must part with it to the society either by contract with it, or through the exercise of the power of condemnation. This property, we think, is subject to local as well as to state taxes. Whether the rights and powers thus granted to the society were in fact necessary to enable it to acquire this property is immaterial. It was so considered both by the state and the society; and the latter cannot use the grant for the purpose of such acquisition, and then repudiate the condition attached to it.

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How much of the property is within the taxing district of the city of Paterson, and what its value is, are matters which are not before us. They have not yet been determined by the Supreme Court, and must be settled in the first instance by that tribunal. *Sisters of Charity of St. Elizabeth v. Cory, Collector*, 73 N. J. L. 699.

The judgment under review will be reversed, and the record remitted to the Supreme Court for the purpose of having there determined what proportion of the whole amount of the tax under review was assessed and collected for the support of the free public schools of the state; and how much of it was assessed upon property acquired by the society under the powers conferred upon it by the act of 1868, and the value of that property.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, TERHUNE, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

THE STATE, DEFENDANT IN ERROR, v. JAMES BAVIER
ET AL., PLAINTIFFS IN ERROR.

Argued March 8, 1916—Decided June 19, 1916.

Where defendants, who had been sworn in as deputy sheriffs to protect a manufacturing plant during a strike of its employees, were on trial for the killing of a man during an altercation with a mob of strikers, it was error to exclude testimony of previous rioting and disorder among the strikers which had been continuous for some time previous to the shooting, since such evidence would tend to show that the deputies believed that some of the employees, whom it was their duty to protect, were in danger of attack, and also since such evidence would have a bearing on the contention that the mob, and not the deputies, were the real aggressors and that the deputies acted in self-defence.

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On error to the Supreme Court.

For the plaintiffs in error, *Joseph S. Stricker, George W. C. McCarter and Robert H. McCarter.*

For the state, *John W. Wescott, attorney-general, and Herbert Boggs, assistant attorney-general.*

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The plaintiffs in error, defendants below, together with sixteen other persons, were indicted by the grand jury of Middlesex county for the crime of murder committed upon the body of one Alesandro Tessitore. The indictment having been removed by *certiorari* to the Supreme Court, application was there made by the state for a severance, with the result that the plaintiffs in error (nine in number), together with one Smith, were ordered to be tried separately from the other fifteen persons named in the indictment. The trial resulted in the acquittal of Smith, and the conviction of the plaintiffs in error of the crime of manslaughter.

Numerous grounds of reversal are urged before us. Some of them are directed at rulings of the court in disposing of challenges to certain persons who were drawn during the impaneling of the jury. Others are directed at rulings during the trial upon matters of evidence, and still others are directed at the charge to the jury.

The first contention made with relation to the drawing of the jury is that the court improperly restricted the defendants collectively to five peremptory challenges, whereas counsel assert, the law entitled each of the defendants to that number. The question raised by this contention is purely academic, so far as this case is concerned. Before the drawing of the jury was begun, counsel requested the trial court to state whether, under the law, each defendant was entitled to five peremptory challenges, or whether they were entitled to that number collectively, to which the court replied that if the occasion should arise he would rule that the defendants were entitled to but five challenges collectively. The necessity for

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any ruling upon this matter, however, did not arise, for only two peremptory challenges were interposed on behalf of the defendants, or any of them, leaving three unused, even under the view expressed by the court when the jury box was filled.

The only other contention with relation to the impaneling of the jury is that the court wrongly excluded certain challenges for cause interposed against persons whose names were drawn from the panel. It is unnecessary to deal with these challenges *seriatim*; it is enough to say that in no case was the challenge rested upon a ground which would disqualify the juror from service. The overruling of each of these challenges, therefore, was entirely proper.

The next contention is that the defendants did not have a fair trial. This contention is based upon the following situation. During the giving of the testimony of Bavier, certain of the jurors in the early part of his examination, declared that they had not heard more than half of what he said, and others said that they had not heard the last part of his testimony. Thereupon, apparently without any instruction from the court, the stenographer proceeded to read the last two questions and answers. It is said that it was the duty of the court to direct the whole of the witness' testimony to be read. But neither counsel for the plaintiffs in error, nor any member of the jury, requested that this should be done, or that any more of it should be read than has been indicated. We fail to see in this occurrence anything injurious to the defendants or prejudicial to their rights. The trial court had a right to assume, in the absence of any declaration to the contrary, that both the complaining jurors and counsel for the defendants were satisfied with the reading of that part of the testimony which has just been mentioned, and did not desire the reading of any further portions thereof. If counsel considered that there should be a further reading, he should have applied to the court to direct that this course should be pursued. Failing to do so his clients cannot now complain of non-action on the part of the court.

The principal ruling upon evidence which is complained of was the exclusion of testimony relating to the conduct of

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a body of men, of whom the person who was killed was one, anterior to the day of the homicide. In order to appreciate the force of the contention a brief recital of the facts is necessary.

The Williams & Clark Fertilizer Company operated a plant located on the Kill-von-Kull at a place called Roosevelt in Union county. The Liebig Manufacturing Company carried on a similar business at a point about a mile and a half distant. Both of these concerns were owned and controlled by the American Agricultural Chemical Company. Some two weeks prior to the occurrence of the homicide the great body of the employes of these two concerns declared a strike against their employers. For the protection of their property, and those who remained in their employ against the strikers, the two companies thereupon employed the defendants, and some thirty odd other men as guards. All of these men were sworn in by the sheriff of Union county as special deputies. On the 19th of January, 1915, this being the day when the homicide occurred, the strikers, some two or three hundred in number, or a mob of men who were supposed to be the strikers, armed with clubs, stones and some fire arms, visited the Liebig plant and held up a train in front of the factory which was supposed to have employes of that company upon it. Shortly afterwards, this mob started in the direction of the Williams & Clark plant, that being the place where the defendants and their associates had been stationed. When the mob reached a point in plain sight of the Williams & Clark factory they held up another train, with the apparent purpose of seeing whether any men who still remained in the service of the latter company, or any strike breakers, were on board of it. The defendants and some of their associates thereupon left the Williams & Clark factory and went toward the railroad. An altercation then ensued in which a number of shots were fired by the deputies, and Tessitore and one Kalman Batyi were killed. The claim of the state was that this firing was **not only** without any legal justification, but was purely **wanton**. The defendants, on the other hand, contended among **other things**, that the killing occurred in the resisting of an

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assault made upon the deputies by the mob, and was done in self-defence. The purpose of the excluded testimony was to show that to the knowledge of the defendants, almost from the time of the institution of the strike there had been more or less disorder among the strikers as a body; that they had held up trains previously; had frequently surrounded the plant, both of the Liebig Company and Williams & Clark; had thrown stones and broken windows there; that they had charged the gate of the latter plant, entered by force and taken out employes who were working during the strike, and that during all that period there was a state of continuous disorder by the strikers against these two plants.

It seems to us that this evidence was both competent and material upon the question whether these defendants had reasonable cause to believe that in performing what they conceived to be their duty in going out toward the railroad tracks for the apparent purpose of protecting employes of the Williams & Clark Company if any should happen to be on the train, they were in great danger of being assaulted and injured by the members of this disorderly body of men. It was also competent and material as tending to support the claim of the defendant that the mob, and not the deputies, were the aggressors, and that what was done by the deputies was done in self-defence. The purpose of the offer was, not to prove mere isolated acts upon the part of the body of strikers, but a continuous course of conduct from which the jury might properly find that the state of mind of the members of the body of strikers which had been exhibited by their conduct in earlier days of the strike, still persisted at the time of the occurrence which led to the shooting of Tessitore. The exclusion of this testimony being palpably injurious to the defendants compels a reversal of the judgment of conviction.

As the case must go back for a retrial for the reason just stated, we deem it proper to say that we have examined the various reasons for reversal which are directed at the charge to the jury, and that we find nothing in them which would justify a reversal. The instruction with relation to the law

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of self-defence was accurate in its application to the case in hand. The instruction that all of the defendants could be held guilty, although it was impossible to identify the man who actually fired the fatal shot, was not erroneous, but should have been qualified by the proviso that the unlawful act in which the defendants with others were engaged was one of which the crime charged against the defendants was a natural or probable consequence. The requests to charge, except so far as they were in fact charged, were properly refused.

The judgment under review will be reversed.

For affirmance—BLACK, J. 1.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

EDGAR L. TROTH, RESPONDENT, v. MILLVILLE BOTTLE
WORKS, APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

1. The supplement to the Workmen's Compensation act (*Pamph. L. 1911, p. 762*), providing that every contract of hiring then in operation shall be presumed to continue subject to the provisions of section 2 of the original compensation act unless either party shall, prior to an accident, in writing, notify the other party to such contract that the provisions of section 2 are not to apply, simply permits the parties to the contract to alter its terms and provisions, and provides a rule of evidence as to what shall be proof of the altering of such contract by mutual consent. The legislature has not, by this statute, impaired the obligation of the master and that of the servant arising out of the original contract of hiring.
2. Actual knowledge by, or formal notice to an authorized agent of, a corporation is sufficient notice under paragraph 15 of the Workmen's Compensation act. *Pamph. L. 1911, p. 134*.

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On appeal from the Supreme Court, whose opinion is reported in 86 N. J. L. 558.

For the appellant, *Louis H. Miller*.

For the respondent, *Wescott & Weaver*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The present action was instituted in the Court of Common Pleas of Cumberland county under the Workmen's Compensation act of 1911. *Pamph. L.*, p. 134. The plaintiff was a minor engaged in the service of the defendant company, and was injured by being struck in the eye with the handle of a mold-making machine which he was operating at the time of the injury. The trial court held that he was entitled to the benefits of the statute, and awarded him compensation accordingly. Upon review by the Supreme Court the award was affirmed, and from the judgment of affirmance the present appeal is taken.

The first contention made before us is that the case is not within the statute, for the reason that the defendant company had refused to accept its provisions, and had notified the plaintiff and his parent (by whom the minor's contract was made) of such refusal, before the happening of the accident. Upon this point we concur in the conclusion reached by the Supreme Court and in the reasoning upon which it is based.

It is further contended that the supplement to the Workmen's Compensation act, approved May 2d, 1911 (*Pamph. L.*, p. 762), is unconstitutional, so far as it applies to the present case, for the reason that the contract of hiring was entered into before the enactment of the original statute, and that its obligations are impaired thereby. Section 2 of the original act provided that the parties to a contract of employment might agree between themselves that the scheme provided by that section should become a provision of their contract, and should then be the sole measure of the obligation of the employer for injuries received by the employe by accident

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arising out of and in the course of the employment, and the sole measure of the compensation to which the employe should be entitled for injuries so received. It further provided that in all contracts of employment made after the statute went into effect, it should be presumed that the parties to it had accepted the provisions of the section, and had agreed to be bound thereby, unless there should be a written notice given by one of the parties to the other, prior to any accident, that such provisions were not intended to apply. The supplement now attacked, so far as it affects the present case, declares that "every contract of hiring now in operation shall, after this act takes effect, be presumed to continue subject to the provisions of section 2 of the act to which this is a supplement, unless either party shall, prior to accident, in writing notify the other party to such contract that the provisions of section 2 are not intended to apply."

In the case of *Sexton v. Newark District Telegraph Co.*, 86 N. J. L. 701, we had occasion to consider the effect of this supplement upon a contract of hiring entered into after its enactment, but prior to the date upon which it went into effect, and held that it violated no constitutional rights of the parties to that contract; adopting the view of Mr. Justice Trenchard in an opinion delivered in the Supreme Court. 84 N. J. L. 85. The question now presented is a broader one, and involves the validity of the statute as to contracts of employment entered into prior to its enactment.

That the parties to an existing contract may, by mutual consent, modify or change it by altering or excising certain of its provisions, or by adding new provisions thereto—provided the modifications or changes do not make the contract illegal, or violative of public policy—is elementary law. And this may be done orally, even though the original contract be in writing. *Headley v. Cavileer*, 82 N. J. L. 635. Whether prior to the enactment of the Workmen's Compensation act, a contract of employment which undertook to change the common law obligations of the master, and to fix an arbitrary sum as the amount to be paid to the servant as compensation

in the event of his being injured while being engaged in his master's service, would have been opposed to public policy need not now be considered, for by that act, the legislature has authorized such changes to be made to the extent therein specified, and its power to do so cannot be questioned.

The supplement under consideration does two things, and only two things. First, it permits, but does not compel, the parties to an existing contract of hiring to alter its terms by eliminating those provisions of it, either expressed or implied, which regulate the obligation of the master to make compensation to the servant for injuries received by the latter while engaged in the master's work, and substituting in the place thereof the measure of the master's obligation provided by the original act, and the scheme of compensation created thereby. It needs no argument beyond what has already been stated to justify such legislative action. Second, it provides a rule of evidence for determining in a given case whether or not the parties to a contract of employment which was entered into prior to the enactment of the statute, have or have not taken advantage of the permission granted thereby, and by mutual consent altered the original terms of that contract by substituting the measure of the master's obligation, and the extent of the servant's right of recovery, provided by the original act. The rule of evidence thus provided is that, unless one of the parties to the contract shall in writing notify the other, prior to the happening of an accident to the servant, of his unwillingness to have the contract altered by reading into it the provisions of section 2 of the original act, it shall be conclusively presumed, whenever the question of the servant's right to compensation from the master for injuries received shall arise, that the parties to the contract had, prior to the happening of the accident, by mutual agreement so altered it.

Neither in the granting of permission to the parties to a contract of employment to change its provisions in the manner and to the extent indicated, nor in providing a rule of evidence for ascertaining whether or not the provisions of a

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given contract have been so changed, has the legislature impaired in any degree the obligations either of the master or the servant arising out of the original contract of hiring.

Lastly, it is contended that by force of the fifteenth paragraph of section 2 of the original act an employe is not entitled to compensation unless the employer shall have actual knowledge of the occurrence of the injury, or shall obtain such knowledge within ninety days thereafter, except upon proof of written notice given to the employer by the employe within the ninety day period. The argument is that where the employer is a corporation it is impossible that it shall have actual knowledge of the occurrence of an injury to one of its employes, and that, therefore, in the case of a corporate employer, it is under no obligation to make compensation unless it receives the statutory notice.

It is conceded that no notice in writing was given in the present case.

The question raised by this contention has already received consideration at our hands in the case of *Allen v. Millville*, 88 N. J. L. 693, and was resolved adversely to the appellant's contention. We see no reason to change the view expressed by us in the opinion delivered in the cited case.

The judgment under review will be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, PARKER, MINTURN, KALISCH, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ.
13.

For reversal—None.

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EMMA E. M. GORE ET UX., APPELLANTS, v. DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COMPANY,
RESPONDENT.

Submitted April 5, 1916—Decided June 19, 1916.

Where the evidence showed that the plaintiff suffered injury by reason of a combination of elements creating a situation calling for the exercise of some care on the part of a carrier for the safe exit of the plaintiff from its train, and that the defendant exercised no degree of care, a nonsuit was error.

On appeal from the Supreme Court.

For the appellants, *Lum, Tamblyn, & Colyer and Elmer King*.

For the respondent, *Frederic B. Scott*.

The opinion of the court was delivered by

GARRISON, J. The plaintiff having been nonsuited the state of the case upon appeal comprises all of the facts in evidence that make for the plaintiffs' right to recover.

The facts therefore with which we have to deal are that on February 3d, 1914, at a little after five o'clock p. m., Mrs. Gore, aged sixty-four, took the defendant's train at Morristown for Orange; that upon previous occasions when she had made the same trip she had alighted from the train at Orange on the station platform at about the centre of its length; that on the occasion in question when the train made the stop for the Orange station she stepped out of the car in which she had been riding on to the car platform and down the steps until she stood on the bottom step; that she then took hold of the rail with her right hand and reached down from the step with her left foot as far as she could and then letting go with her hand her foot descended a long distance before striking the rough surface of a Belgian block pavement, whereupon she lost her balance, pitched, tried to gain her

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equilibrium, but failed and fell. This is the plaintiff's account of her accident substantially in her own words.

Additional facts are that the train stopped at a point where the plaintiff in leaving the car in which she rode alighted not on the station platform, but on a roadway paved with rough Belgian blocks; that the light was so dim that she could not see the surface of the road; that there was no brakeman to show a light or to assist her in getting off; that she looked for one and waited a few seconds and then let herself down, as the train did not stop long at the station.

The discussion whether this accident was due to faulty construction or to negligence in operation and whether the care owed by the defendant was of a high degree or only such as was reasonable, seems to be entirely academic, in view of the fact that no degree of care was exhibited and that the accident was at least in part attributable to matters of train operation. The arrangement and extent of the station platform, and the height of the car steps from the ground, may be matters of construction; but the stopping of the train at one place rather than at another, the providing of proper light, the presence of trainmen to assist passengers in alighting under certain circumstances or to warn them of certain conditions are pure matters of operation. It may well be that as to no one of the elements that contributed to cause the plaintiff's accident did the defendant violate any direct duty owing to her, and yet it may also be true that the combination of all of these elements created a situation that called for the exercise of some care by the carrier for the safe exit of the plaintiff from its train.

Such duties by a carrier are often in the alternative, so that while no one duty is specific, it does not follow that they may all be neglected with impunity. Thus, under ordinary conditions, there is no direct duty to assist passengers to alight, or to warn or instruct them, or to furnish additional light, so, also, there may be no direct duty to stop the train opposite the station platform or to avoid disembarking passengers on a paved roadway, but, notwithstanding the absence of direct duty as to each of these isolated elements, an

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alternate or conditional duty may arise from their fortuitous combination. Thus the duty to warn or assist, not in itself a direct duty, may arise from the unusual conditions created by the place of stoppage, not in itself the violation of a direct duty.

This, it seems to us, is the situation presented by the plaintiff's testimony from which a jury might infer an invitation to leave the train under conditions that placed upon the defendant the duty of using such care as arose out of such conditions and was commensurate with the danger to be reasonably apprehended therefrom.

It was error therefore to nonsuit the plaintiff.

The judgment of nonsuit is reversed and a *venire de novo* awarded.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

HELEN MINGOES, ADMINISTRATRIX, APPELLANT, v.
CENTRAL RAILROAD COMPANY OF NEW JERSEY,
RESPONDENT.

Argued March 13, 1916—Decided June 19, 1916.

1. The submission of testimony on rebuttal of evidence which related to plaintiff's main case is a matter for the discretion of the trial court.
2. Where no objection is made to a question asked a witness, and the answer is responsive, the motion to strike out part of the answer was properly denied.

On appeal from the Hudson Circuit Court.

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For the appellant, *Alexander Simpson*.

For the respondent, *Charles E. Miller* (*George Holmes* on the brief).

The opinion of the court was delivered by

GARRISON, J. This action was instituted in the Circuit Court to recover damages under the Death act. The negligence charged in the complaint was in the blowing of a locomotive whistle in an unreasonable way. There was a verdict in favor of the defendant and from the judgment entered thereon this appeal was taken by the plaintiff.

The grounds for reversal argued by appellant's counsel are, first, that it was error to overrule a hypothetical question put by plaintiff below to a medical witness concerning the mental condition of the defendant's locomotive engineer on November 2d, 1914, the day of the accident. This testimony was offered upon rebuttal; it had reference to the accident set forth in the complaint and it was therefore the duty of plaintiff to offer it on his main case. The overruling of such testimony is a matter of discretion. Moreover the complaint does not allege that the engineer was an unfit person to be employed by the defendant or charge any negligence in that respect. The fact that the question tended to contradict defendant's witnesses upon immaterial points did not remove it from the class of discretionary rulings.

There was no error in the ruling. The second ground is that the court ruled that a certain question was not objectionable as leading. This also was a discretionary matter.

The third ground is that the court refused to strike out a part of an answer given by a witness. The question put to the witness by defendant's counsel was, "While you were with him (the engineer), did he appear to you to be a bright or a dull man?" This was not objected to. The answer of the witness was, "Well, of course, everybody has their opinion. He seemed to me to be a very sure man in my eyes. I took him for a model." It is this last sentence that counsel for the plaintiff moved to have struck out. Taken in connection

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with the question the answer meant a model of brightness, hence it was responsive, and even if not, it was relevant. The question called for an opinion on the question of brightness and was not objected to. There was no error in the denial of the motion.

Finding no error in any of the grounds of appeal that have been argued, the judgment of the court below is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, TERHUNE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

THE STATE, DEFENDANT IN ERROR, v. CHARLES D. MANDEVILLE, PLAINTIFF IN ERROR.

Submitted March 27, 1916—Decided June 19, 1916.

Section 119 of the Crimes act makes it a criminal offence for any person, who maliciously or without lawful justification with intent to cause or procure the miscarriage of a woman pregnant with child, "shall advise her to take or swallow any poison, drug, medicine or noxious thing." *Held*, that the collocation of the four prohibited agencies being disjunctive, an indictment is sufficient which charges the administering of a "drug" alone, without any allegation of the administering of any of the other three prohibited agencies, to wit, "poison, medicine or noxious thing."

On error to the Supreme Court, whose opinion is reported in 88 N. J. L. 418.

For the plaintiff in error, *Frank E. Bradner*.

For the defendant in error, *Frederick F. Guild and Wilbur A. Mott*.

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The opinion of the court was delivered by

GARRISON, J. The plaintiff in error was convicted under section 119 of the Crimes act (2 *Comp. Stat.*, p. 1784), originally passed March 1st, 1849 (p. 266), which reads as follows:

"Any person who maliciously or without lawful justification, with intent to cause or procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug or medicine or noxious thing; or who maliciously or without lawful justification, shall use any instrument or means whatever, with the like intent, shall be guilty of a high misdemeanor, and punished accordingly; and if the woman or child die in consequence thereof, be punished by fine not exceeding \$5,000 or imprisonment at hard labor not exceeding fifteen years, or both."

We concur in the reasons given in the opinion of the Supreme Court sustaining this conviction, excepting as to the reason therein given for holding that the indictment charged a criminal offence notwithstanding that it did not allege that the drugs advised or directed to be taken were noxious. The language of the opinion of the court below upon this point is as follows:

"The indictment contains two counts. The averment of the first is that the defendant, 'with intent to cause and procure the miscarriage of one Goldie Smith, then pregnant with child, did direct the said Goldie Smith to take divers drugs, to wit, ergotine, cotton root extract, oil and extract of savin, contained in divers pills known as emmenagogue pills.' The averment of the second count is like that of the first, except that it charges the defendant with advising the woman to take the specified drugs. The contention in support of the motion to quash was that the indictment does not charge a criminal offence in either count, because it nowhere alleges that the drugs directed or advised to be taken were any of them, either separately or when mingled together, noxious in character. If the indictment had charged the defendant

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with directing or advising the woman to take a drug, the identity of which was unknown to the grand jury, but had failed to aver that the drug was noxious in character, the contention of counsel for the defendant would have been entirely sound; for unless the drug was noxious there was no violation of the statute. *State v. Gedicke*, 43 N. J. L. 86. And in the absence of such an averment the law will not presume that the drug directed or advised to be taken was of the character struck at by the statute. But where the indictment specifies the particular drug or combination of drugs advised to be taken, the absence or presence of an averment that it or they are of a noxious nature is entirely immaterial. If such be the fact the averment is unnecessary; if the fact be otherwise the averment will be unavailing."

Without reference to the soundness of the reasoning of the court below upon the basis assumed by it, we take a different view of the scope of the statute and think that its language requires that a broader meaning and effect be given to it than that ascribed to it by Mr. Justice Scudder in *State v. Gedicke*, 43 N. J. L. 86. The pertinent words of the statute are "shall advise or direct her (a pregnant woman) to take or swallow any poison, drug, medicine or noxious thing."

By the disjunctive collocation of these four prohibited agencies the statute has, upon familiar principles of construction, laid the foundation of four distinct criminal offences, any one of which, if properly pleaded in the indictment, constitutes a distinct crime. *State v. Brand*, 77 N. J. L. 486; *State v. Drake*, 30 *Id.* 422, which was upon this very statute.

The present indictment is based upon the prohibited agent "drug" alone, and hence need contain no allegation as to the other three agencies, to wit, "poison, medicine or noxious thing." It is therefore perfectly clear that the indictment charges a criminal offence as to the drugs that were advised or directed to be taken, and that the mention of any of the three other agencies would be entirely superfluous unless the pleader intended to charge an offence committed in connection with such other agencies.

This plain rule of criminal pleading is thrown into some confusion by the view expressed *obiter* by Mr. Justice Scudder in *State v. Gedicke*, viz., that "the collocation of the words in this statute requires that the thing used to effect the miscarriage should be noxious—that is, hurtful." The ground of this error of construction—and it was an error—is made apparent by the next sentence of the opinion which restates the language that was being dealt with as "The poison, drug, medicine or *other* thing must be noxious," thereby inserting the word "other," which would justify the construction put forth without giving any consideration to the circumstance that such controlling word was conspicuously absent from the statute. The omission of the word "other" from the statute was conspicuous because the English statute of 9 *Geo. IV.*, c. 31, § 13, used these words, "any poison or *other* noxious thing," and it was upon this language that the English cases were based, which were made prominent by the opinion delivered in *State v. Cooper*, 22 N. J. L. 52, in consequence of which, so a footnote informs us, the act of March 1st, 1849, was enacted.

Under these circumstances the omission of the word "other" from our statute, which was in a measure founded upon the English statute which contained that word, renders such omission a deliberate act of legislation. Even without this history the established canons of construction compel us to treat the words of the statute as they were enacted and forbid us by judicial legislation to read into the statute a word that narrows its scope and gives a totally different meaning to its provisions. This is, of course, doubly the case when the word we are thus asked to read into the act has been deliberately left out of it by the legislature in framing its enactment.

Apart from this error of construction the view expressed in the opinion in *State v. Gedicke* to the effect that the design of the statute was to guard the health and life of the pregnant female, while true as far as it goes, ignores the salutary effect of the statute as a preventive of a crime against

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public morals and the welfare of the state, which is equally within its language and purview. I am aware that the narrower view receives some support from an expression in the opinion in *State v. Murphy*, 27 N. J. L. 112, where the question now under consideration was not before the court. There is nothing, however, in either opinion that should prevent us, in a case where the question is squarely presented, from giving to the language of the statute all of the force that such language possesses as a deterrent not only of personal injury to a class of citizens of the state, but also of public injuries to the entire body politic. Such latter offence is clearly within the language of the act, and would be equally injurious to public morals and welfare if the means employed were entirely innocuous to the pregnant female or even if they were positively beneficial, to her well-being. That the framers of our statute had this in mind is fairly indicated by the gradations adopted by the statute in its enumeration of the prohibited agencies which passed from "poisons," which clearly would be harmful to the female, to "drugs," which might not be so, and then to "medicines," which presumably were not so, leaving those things denominated as "noxious" to have sole reference to the female as in the English statute.

Every consideration therefore, legal or ethical, leads to this as the proper construction of the statute on which the present indictment was based.

That the contrary view suggested in *State v. Gedicke* was *obiter* clearly appears from a reading of the opinion in that case. The question propounded by the writer of the opinion, and in connection with which the views we have criticised were expressed, was whether it was error for the trial court to charge that the medicine, drug or noxious thing advised to be taken should be capable of producing a miscarriage. The opinion properly held that this was not error, but there was nothing in the decision of this question that called for the narrow construction placed upon the statute or that called

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for the expression of opinion in which, for the reasons given, we find ourselves unable to concur.

It is not necessary, therefore, to overrule the decision in the case cited, but only to point out that the question we are deciding was not decided by that case.

The validity of the present indictment is sustained, therefore, directly upon the language of the statute and not upon the reasoning of the Supreme Court. This conclusion also affects the reason given in the court below for sustaining the proof by the state that the administration of the drugs named in the indictment would tend to produce a miscarriage.

If this testimony had been objected to its admission would have been harmless for the reason that under the statute and under this indictment the conviction could be sustained if the drugs did not tend to produce miscarriage and whether they were noxious or not. The testimony was not, however, objected to and the only judicial action challenged is the refusal of the court to grant a motion to strike out this testimony after the state had rested its case. The denial of this motion rested in the discretion of the trial court, which in the present instance was not abused.

With the foregoing modifications the judgment of the Supreme Court is affirmed for the reasons stated in the opinion of the court.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

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STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
ALONZO WILLIAMS, PLAINTIFF IN ERROR.

Argued March 20, 1916—Decided June 19, 1916.

A verdict by a trial jury that the "jury has agreed to convict the defendant guilty of murder in the first degree with recommendation of mercy by the court, if the court will accept," shows that the agreement of the jury turned upon a contingency which continued to exist when judgment was pronounced, and the state of mind thus evinced is inconsistent with the existence of a verdict; so long as such state of mind continued no conviction of defendant had been reached.

On error to the Somerset, Oyer and Terminer.

The plaintiff in error, Alonzo Williams, was indicted for the murder of Benjamin Wooley. Both men were convicts detained in the state camp in Somerset county. On the afternoon of May 2d, 1915, during a game of baseball Wooley accused Williams of tripping him while running the bases and some angry words were exchanged between the two men who had previously been friends. When the game was over Wooley went into the dormitory, which was near the ball ground, and sat down on his bed. Williams also entered the dormitory still carrying in his hand the bat he had used during the game. There was evidence that the bats were customarily brought in after the game. Williams first went to his own bed and then walked over to Wooley's bed still having in his hand the baseball bat, with which, after a few angry words, he struck Wooley two or more blows, causing a fatal fracture of the skull. Upon the trial of the indictment the court, while explaining to the jury the nature of their duties, said, "They (the jury) have nothing to do with the imposition of the sentence. They can, indeed, in certain cases recommend the prisoner to the mercy of the court; but first and foremost and practically exclusively the duty of the jury is to ascertain from the evidence whether the crime has been committed and

whether the prisoner is guilty of it." The court then defined murder in the first and second degrees and manslaughter, without again referring to the recommendation of mercy by the jury. The statute authorizing juries to recommend life imprisonment in lieu of the death penalty for murder in the first degree (*Pamph. L. 1916, p. 576*) had not been enacted at the time this trial took place, viz., November 8th, 1915.

After the delivery of the charge the jury retired and some hours later returned to the court room for further instructions. Neither the prosecutor of the pleas nor counsel for the prisoner were on hand and there being no stenographer present the justice of the Supreme Court presiding in the Oyer and Terminer made the following memorandum of what took place, which is returned with the writ of error pursuant to the one hundred and thirty-sixth section of the Criminal Procedure act:

"Memoranda of occurrences in the trial of the State v. Alonzo Williams, after the jury had been charged and had retired to consider their verdict.

"The jury, after having been out for several hours, returned into court and said that they wished for further instructions; and, upon being interrogated by the court, asked a question which was read by one of the jurors from a paper; the paper, however, has not been preserved.

"The question was substantially this: How long a time must intervene between the formation of an intent to kill and the execution of that intent, in order to give the killing the quality of premeditation and deliberation?

"To which the court replied substantially by reading to the jury certain extracts from the case of *State v. Mangano*, 77 N. J. L. 544.

"The court read the quotation at the head of page 545 as an example of a charge which erroneously laid down the rule, and then proceeded to discuss the rule as laid down in recent cases, reading to the jury the quotation from the opinion of Mr. Justice Garrison, on the lower part of page 546, following that with the language of the Mangano opinion, at the

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foot of page 546 and on page 547 as far as the word 'not until after such premeditation and deliberation have taken place does the act become willful in the sense intended by the statute.'

"The court added a few words on the same line as the above quotation, but the language cannot now be reproduced.

"The jury then retired.

"At eight forty-five P. M. the jury reported that they had agreed upon their verdict, and were recalled into court. The prisoner was present, but not the prosecutor nor the prisoner's counsel, although an effort was made to secure their attendance.

"The jury, upon being asked by the clerk if they had agreed upon their verdict, reported that they had; and upon being asked who should speak for them, said Mr. William G. Kershaw.

"In response to the usual question from the clerk Mr. Kershaw read from a written paper, the following:

"The jury has agreed to convict the defendant guilty of murder in the first degree with recommendation of mercy by the court, if the court will accept."

"The court thereupon informed the jury, in substance, that the statute fixed the penalty for murder in the first degree, and it was beyond the power of the court to comply with any recommendation to mercy.

"The jury was not polled.

"A member of the jury said that they had determined to render their verdict in that form; and it was said by one or more of the jurors that the jury were unable to agree upon a verdict in any other form.

"The court stated that it saw no objection to receiving the verdict with the above recommendation; and the verdict was taken accordingly and the jury were discharged."

The judgment record contains a verdict in these words, "Jury has agreed to convict the defendant guilty of murder in the first degree with recommendation of mercy by the court, if the court will accept," and thereupon a judgment of death was at a later date pronounced by the court.

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For the plaintiff in error, *William V. Steele*.

For the defendant in error, *Azariah M. Beekman*.

The opinion of the court was delivered by

GARRISON, J. In a criminal case the record or judgment roll, as it is indifferently called, must show the issue (indictment and plea), the presence of a court and jury, the verdict rendered by the jury and the judgment pronounced thereon by the court. *Clifford v. Hudson Oyer and Terminer*, 61 N. J. L. 493.

Between the last two of these essentials, *i. e.*, the verdict and the judgment, the legal relation is such that the question whether or not the verdict justifies the judgment will be reviewed by an appellate court upon error assigned on such record.

In the present case, in which such error is assigned, it is, to say the least, very questionable whether the record shows any verdict at all in the legal sense of that term. For the verdict is the definitive answer given by the jury to the court concerning the matters of fact committed to the jury for their deliberation and determination, a process in which not only must deliberation precede determination, but in which so long as the one continues the other has not been reached. Hence so long as the jury is in common parlance "agreeing upon its verdict" it has not convicted the defendant and the process of agreeing upon a verdict continues as long as there is any uncertainty or contingency as to the finality of such determination. This eminently practical distinction is illustrated in the verdict shown by the present record in which the conviction of the defendant so far from being definitely and unconditionally determined by the jury is expressly made to depend upon a contingent event of equivocal import upon which, however, the very agreement of the jury to convict the defendant is made to hinge. The state of mind thus evinced is inconsistent with the existence of a verdict; hence as long as such state of mind continues no conviction of the defendant has been reached and it is imperatively presumed on this

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record that such state of mind continued until the contrary is shown. Such state of mind therefore continued when judgment was pronounced since the contrary is not shown and *quod non apparet non est*.

The state of mind thus shown obviously appertains to the period when the jury is agreeing upon its verdict and not to that period when a definitive verdict has been unconditionally determined upon.

In this essential particular the present case is the exact opposite of *State v. Overton*, 85 N. J. L. 287, where the verdict was guilty of murder in the first degree with a recommendation to the leniency of the court. Such a verdict showed that deliberation was at an end and that a determination had been reached, the legal effect of which was passed up to the court. Here, on the contrary, the very agreement of the jury turned upon a contingency, which situation, so far as the record discloses, continued to exist when judgment was pronounced.

It is evident therefore that it is not the plaintiff in error but the state who must invoke the proceedings at the trial to eke out a record that is inadequate to support the judgment. But can either party do this in an appellate proceeding in which, in the language of this court: "The record of the court below is always conclusive evidence of all matters that are properly included in it and will prevail over incompatible statements appearing *aliunde*? If the record is wrong the remedy is to have it amended." *Morton v. Beach*, 56 N. J. Eq. 791.

No motion to amend the record has been made and it is not perceived how such a proceeding could benefit the state, since a reading of the memorandum of the happenings at the trial in connection with the record returned to this court shows conclusively that whatever the court below may have said to the jury or the jury have said to the court the verdict that had been reduced to writing by the jury and handed to the court was the one the court decided to accept and that it was accordingly taken as the verdict of the jury and as such spread upon the record.

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The amendment of the record by the judicial memorandum returned with the writ of error would not therefore, in the slightest degree vary the situation or overcome the inadequacy of the verdict to support the judgment that was pronounced thereon.

The judgment must therefore be reversed and the record remitted to the Somerset Oyer for a retrial of the indictment.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, TERHUNE, HEPPENHEIMER, WILLIAMS, JJ. 6.

For reversal—GARRISON, TRENCHARD, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TAYLOR, GARDNER, JJ. 9.

ALBERT W. BONYNGE, RESPONDENT, v. ADAM FRANK
ET AL., DEFENDANTS.

Submitted March 27, 1916—Decided June 19, 1916.

1. A demurrer to an information in the nature of a *quo warranto* admits the charge of the information that the demurrant intrudes into and unlawfully holds and exercises the office, but where the information itself shows that a demurrant is entitled to the office, the averments are inconsistent and the demurrant is entitled to judgment.
2. Informations in the nature of a *quo warranto* under our statute are of three classes: (1) by the attorney-general without leave of the court at his own discretion; (2) in the name of the attorney-general by leave of the court at the instance of any person desiring to prosecute; (3) under section 4 of the act where the question is of usurpation or intrusion into a *municipal* office or franchise, by a citizen who believes himself lawfully entitled to such office or franchise.
3. Even in the case of information in the nature of a *quo warranto* as to a municipal office or franchise, the title of the relator could not be put in issue prior to 1895. Under the act of that year (*Comp. Stat.*, p. 4214) it is not incumbent on the relator to put his own title in issue; but the defendant is permitted to do so, and the court will then determine which claimant, if either, is entitled to the office. *Manahan v. Watts*, 64 N. J. L. 465, explained.

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4. In case of an information in the nature of *quo warranto* under section 1 of the act in the name of the attorney-general by leave of the court, any person desiring to prosecute may be relator; he need not himself claim the office; but leave of the court will not be granted unless the relator is acting in good faith in vindication of his own rights or those of the public or a portion of the public.
5. An information in the nature of *quo warranto* will lie jointly against several members of a board of trustees of a cemetery company.
6. Creditors of a cemetery company, under the general laws relating to cemeteries, have no right to vote at an election of trustees.
7. Where an information in the nature of *quo warranto* shows that a cemetery company had fifteen trustees; that the terms of five only had expired and the terms of ten had not expired; that nevertheless an attempt had been made to elect nine as successors of the fifteen, a judgment of ouster follows a demurrer to the information as to any defendant who is brought into court, and not shown by the information itself to be entitled to the office.

On appeal from the Supreme Court.

For the respondent, *Merritt Lane*.

For the appellants, *Waldron M. Ward (Pitney, Hardin & Skinner on the brief)*.

The opinion of the court was delivered by

SWAYZE, J. Much difficulty has been caused by the manner in which the printed case is made up. We have only the information in the nature of a *quo warranto*, a demurrer by the defendant Cerrata, a separate demurrer by the defendant Moses, and a joint judgment against both. The other defendants are not shown to have been brought into court. The practice is set forth in *Attorney-General v. Delaware and Bound Brook Railroad Co.*, 38 N. J. L. 282. It is unfortunate that in this state of the record we can deal only with the cases of Cerrata and Moses.

The real question is whether a group of nine trustees of a cemetery association, who may be called the Frank party, or a group of fifteen who may be called the Bonynge party, are entitled to the office. The Frank party claim under an elec-

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tion held April 25th, 1913, at which an effort was made to reduce the number of trustees from fifteen to nine, and to elect the nine then and there. The Bonynge party claim ten under a previous election for terms not yet expired, and five under an election held on the same day as that under which the Frank party claim.

The pleadings are unusual. The information recites that it was exhibited with leave of the court in the name of the attorney-general, and although no rule to show cause or order granting leave is printed in the case, the defendants do not dispute the fact, if, indeed, they could dispute it in the face of their own demurrer. We must assume, therefore, that the question of the propriety of the information was adjudicated by the justice who gave leave to exhibit it in the Supreme Court. The change in the statute since the decision of *State v. Utter*, 14 N. J. L. 84., by virtue of which leave may be by a single justice instead of by the court, makes the language of Chief Justice Hornblower inapplicable. The demurrer does not under present practice in effect seek to review a point already adjudicated by the court; and we do not doubt that the action of the justice may be thus reviewed. The demurrer admits the truth of the facts that are well pleaded. Among these are the averments that the term of office of but five members of the board of trustees expired; that Frank arbitrarily refused to permit any of certain-named person, lotowners and creditors, to participate in the meeting, and refused to permit them to vote; that he declared a resolution adopted reducing the number of trustees from fifteen to nine; and nominated nine persons for trustees, although the terms of office of ten existing trustees, including the relator, had not expired; that he refused to permit votes to be cast by persons representing seventeen lots; that the nine directors constituting the Frank party usurp, intrude into and unlawfully hold and exercise the office of trustees. These averments suffice to entitle the relator to judgment against Cerrata. The demurrer admits the fact that the demurrant usurps, intrudes into and unlawfully holds and exercises the office. *Davis v. Davis*, 57 *Id.* 203,

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204. On the face of the pleadings the relator would be entitled to judgment of ouster unless there is some defect in the information which prevents the result. As to Moses there is such a defect. The information shows that his term has not expired. As to him the averments are inconsistent and he is entitled to judgment. The judgment below against him must therefore be reversed, to the end that judgment on the demurrer may be entered in his favor. We proceed to the case of Cerrata.

The defendants argue that the relator is not shown to have any right to exhibit the information. The point is that although the demurrer admits that the relator is one of the hold-over trustees, his title to the office is not fully set out in the information. The demurrants have conceived the notion that under our present act an information in the nature of *quo warranto* is no longer what it was, a public proceeding to determine a public right, but rather a mere civil suit *inter partes* to determine which is entitled to an office. The error has arisen from the failure to observe the three different species of information—*first*, an information by the attorney-general alone without leave of the court at his own discretion; *second*, an information under section 1 of the act (*Comp. Stat.*, p. 4210) in the name of the attorney-general by leave of the court at the instance of any person desiring to prosecute; *third*, an information under section 4 of the act (*Comp. Stat.*, p. 4212) where the question is of usurpation or intrusion into a municipal office or franchise by a citizen who believes himself lawfully entitled to such office or franchise. The rights of the attorney-general on his own initiative come from the common law; the right of any person desiring to prosecute in the name of the attorney-general comes from section 1 of the act of 1795 (*Pat. L.*, p. 177), as amended in 1903 (*Pamph. L.*, p. 375; *Comp. Stat.*, p. 4210); the right of the claimant of a municipal office to proceed in his own name comes from the act of 1884. *Pamph. L.*, p. 320; *Comp. Stat.*, p. 4212. It is only the third class that resembles a civil suit *inter partes*. Even in cases of that class, under the act as originally passed, the title

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of the relator could not be put in issue. *State, ex rel. Davis, v. Davis*, 57 N. J. L. 203. In that case the court said that the demurrer which was to the information had no effect but to admit the usurpation of the defendant of the office in question. The next year the legislature passed the act of 1895 (*Pamph. L.*, p. 82), which now appears as section 12 (*Comp. Stat.*, p. 4214), with the addition of the words "that the very right may be determined in the one proceeding." It was held under this statute (*Manahan v. Watts*, 64 N. J. L. 465, 470) that the relator must show a title in himself before he can properly inquire by what authority the respondent exercises the same. The court referred to the first decision in *State, ex rel. Davis, v. Davis*, 57 *Id.* 80, on the motion to strike out the plea and not to the later decision in the same case upon demurrer to the information cited above. We think it clear that the court did not mean to decide that it was incumbent on the relator to put his own title in issue. The legislature could not have meant to require that, since it left the act of 1884 unchanged, and under the act, as Chief Justice Beasley said in the second Davis case (*Id.* 505): "So clear is the legislative expression on this point that it does not even make the possession of title in the relator a prerequisite to his right to become the actor in the procedure, for it bestows that privilege on 'the citizen who merely *believes himself* lawfully entitled to such office.'" What the act of 1895 did was to give the defendant the right to put the title of the relator in issue. That such was the effect of the legislation is shown by the decision in *Magner v. Yore*, 75 *Id.* 198. In that case the relator, although he had not set forth his title in the information, had judgment because the defendant had not by his plea challenged the relator's title. In *Bullock v. Biggs*, 78 *Id.* 63, the defendant avoided that difficulty and challenged relator's title by plea. Finally, in *Dunham v. Bright*, 85 *Id.* 391, the dual aspect of an information in the nature of a *quo warranto* was recognized, the present Chief Justice saying: "The rights of the public as well as those of the parties are involved." And the language of the opinion in *Manahan v. Watts*, as far as it was to the contrary, was recog-

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nized as mere *dictum*. We have dealt with this question at greater length than was really justifiable, and we have done so because of the apparent sincerity of the argument that the relator has failed, since he has failed to set forth his title in his information. But the present case does not arise under section 4; it arises under section 1. Under that section *any person* desiring to prosecute is authorized to exhibit an information. To guard against abuse of the right, leave of the court is required, and that leave would not be granted unless the justice was satisfied that the relator was acting in good faith in vindication of his own rights or those of the public, or a portion of the public. In this case the question was decided in relator's favor, and the defendant does not question the good faith of the relator, nor that his object is either to vindicate his own right as trustee, or lotowner, or the rights of his fellow-lotowners, against the anarchy that would result from two boards of trustees assuming to manage the cemetery.

It is further urged that an information will not lie against several persons claiming to be a board of trustees. The theory seems to be that each trustee holds an independent position which must be made the subject of a several suit. We do not doubt that each trustee holds his own office, and that an information could be maintained against each alone; but that is too narrow a view to take of the case. The real question is whether the Frank party constitute the board of trustees, or whether as a board they are usurpers. This can best be determined by bringing all the individual members into court in the same suit. In that suit can be determined any fundamental question that affects the title of all, and at the same time any question that affects the title of one only. The point arose in the King's Bench as long ago as 1776. An information was filed against six different persons for usurping three different offices, affecting the legality of the membership of the freemen and free burgesses and common councilmen of a town. The point was distinctly taken and overruled by Lord Mansfield and his associates. *Symmers v. The King, Cowp.* 489. A precedent of an information against

several persons usurping the offices of burgess and freemen of a borough is given in 6 *Went. Pl.* 154. A similar question has arisen in Rhode Island. *State, ex rel. Andrews, v. Keam*, 22 *Atl. Rep.* 322. This was an information against seven acting as a town council. The court said: "They are all members of one body, having joint functions; and even if it appeared that certain members have been properly elected and others not, there is no reason why a judgment of ouster against those who are not entitled to the office may not be rendered." We need not go outside our own courts for cases in point. As long ago as 1828, an information was filed against seven men who claimed to be trustees of a Presbyterian church; six claimed under one election, one under another election. No difficulty was raised to the procedure by George Wood, who was counsel for the defendants. In 1914, in *Dunham v. Bright*, already cited, an information was filed against the members of a board of education. No difficulty was found by reason of misjoinder.

The suggestion that the effect of a judgment for the relator would be to oust the corporation itself of its franchise hardly merits discussion. The last cases cited are sufficient. The information is not an attack upon the existence of the corporation, or even an attempt to oust all the trustees. The only controversy is as to the personnel of the board. If the Frank party are ousted, the association still has trustees. The judgment against Cerrata is therefore affirmed, with costs.

We have said enough to dispose of the case. It may gratify counsel to know that we have considered the fundamental question and agree with the Supreme Court that creditors had no right to vote. Section 1 of the act of 1848, as amended in 1879 (*Comp. Stat.*, p. 372), is obviously inconsistent with the act of 1899 (*Comp. Stat.*, p. 391), which regulates the right to vote, as well as the number, qualifications and terms of office of trustees. By the later act, proprietors of lots who are of full age are made the electors and the number of trustees may be as many as fifteen. The West Ridgelawn Cemetery, which is the one now involved, had evi-

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dently acted under the act of 1899, since it is shown by the information to have had fifteen trustees; the act of 1848 permitted twelve only. Whether the corporation had acted under the act of 1899 and thereby assented to the deprivation of creditors of the right to vote is not, however, important. In the present case, the creditors who were not allowed to vote are not averred in the information to have owned and held "bonds, stock or other duly-authorized evidences of debt." The averment that under the statute they had the right to cast forty-nine votes is a mere averment of a legal conclusion. The facts stated do not show that they were qualified electors even under the act of 1848, as amended in 1879. The fact that creditors have no vote under the act of 1899, and that their votes were properly rejected, would not be dispositive of the case. It appears that ten trustees held over. If the reduction of the number to nine was properly effected, the board was more than full and the defendants could not be elected because there were no vacancies. Section 1 of the act of 1899 provides for a classification of the trustees first elected, one class to hold for one, one class for two, and one class for three years. Section 2 provides that trustees chosen subsequent to the first election shall hold their places for three years. The clear intent was that trustees should hold for three years, except so far as the classification made necessary shorter terms for some at the beginning. The information shows that the term of office of but five out of fifteen trustees expired; and that the terms of ten had not expired. This could only be if fifteen had been elected prior to the meeting now in question. The necessary inference is that the election of 1913 was not the first election. It is only at the first election, according to the express language of section 2, that a full board of such number as may be determined shall be elected. The attempt to determine a different number, and to elect a full board at the election of 1913, was illegal, and the defendants seem to be guilty of intrusion, as Cerrata for himself admits by his demurrer. There can, however, be no judgment of ouster ex-

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cept as against Cerrata, since Moses is entitled to judgment in his favor, and the others do not appear to have been brought into court. As to the Bonyng party, who are also defendants, there is no issue to be decided. They, too, have not been brought into court.

For affirmance as to Cerrata—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, PARKER, BERGEN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 13.

For reversal—None.

For affirmance as to Moses—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, PARKER, BERGEN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 13.

BROWN REALTY COMPANY, APPELLANT, v. CHARLES R. MYERS, RESPONDENT.

Argued December 2, 1915—Decided June 19, 1916.

The doctrine of ratification is not applicable except where an agent has assumed to act for a principal but without authority. It does not apply where one who makes a contract acts for himself with the knowledge of the other party thereto.

On appeal from the Supreme Court.

For the plaintiff-appellant, Harvey F. Carr.

For the defendant-respondent, Lewis Starr.

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The opinion of the court was delivered by

SWAYZE, J. We think it unnecessary to consider the legal question so thoroughly argued by counsel, as the facts do not require that we do so. The suit is brought, to recover damages said to have been caused by the deceit of Myers' agent. Before the question of the responsibility of the principal for the fraud of his agent is reached, the question of agency must first be proved. Here we think the plaintiff fails. The facts are these: Myers owned real estate in Camden which was leased to Fisher for five years for a rental of \$5,000 a year net, after paying taxes, water rent, sewerage, electric lights and gas bills, interest on mortgage, insurance premiums, and bills for repairs. Fisher seems to have found the lease an onerous one, and desired to have Myers sell the property. On April 24th, 1911, he wrote to Darling commending the property and making statements with reference thereto which are relied on as constituting fraud. Darling brought the matter to the attention of the plaintiff. It is not entirely clear what Darling's position was. Brown, an officer of the plaintiff corporation, by his testimony sought to give the impression that Darling was acting for Myers. There is no proof nor any semblance of proof that he was acting with Myers' knowledge. Darling's employment came from Fisher and it is not pretended that Fisher was authorized to employ a sub-agent for Myers or that Myers in any way recognized Darling as his agent. In fact the plaintiff's effort was to show that Fisher himself was Myers' agent. The difficulty then is that Fisher did not make the representations to the plaintiff. We may assume in favor of the plaintiff that Darling was acting for it, and that Fisher's representation to Darling was equivalent to a representation to the plaintiff. That brings us to the question whether there was any evidence that Fisher was Myers' agent. Both Fisher and Myers deny that there was any relation of agency. According to both, the fact was that Fisher, desiring to get rid of his lease, and to make something for himself out of the exchange, made an agreement on July 12th, 1911, with the plaintiff for the exchange of the Camden property for three tracts, one at

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Aldene, New Jersey, one in New York City, and one at Freeport, Long Island. Thereupon Fisher took the agreement to Myers and procured his assent thereto. It is not entirely clear whether the written contract had then been actually executed by the plaintiff, but Myers says Fisher had the agreement (evidently meaning the written agreement) all ready and that he, Myers, looked it over to see what Fisher wanted him to do; and Fisher says that he had virtually closed with Brown and Weiss (officers of the plaintiff) and had their signatures to a contract really before he presented it to Myers. Fisher also says that he had an idea Myers didn't want to make the exchange, and that he, Fisher, guaranteed Myers so much money out of the transaction and put up \$3,500 to secure the profit to Myers. This testimony of the only witnesses who know the actual arrangement between Myers and Fisher is uncontradicted, necessarily uncontradicted, by the plaintiff. Prior to the execution of the deed, however, and on August 19th, 1911, Fisher and Myers gave written instructions to the plaintiff to execute deeds for the Aldene and Freeport properties to Myers and for the New York City property to Fisher. The titles were passed on August 23d. Up to the time of closing the transaction, no one on behalf of the plaintiff had seen Myers. He was present part of the time while the matter was being closed, but took no apparent interest therein, was in and out, and part of the time asleep on the couch. The plaintiff relies on this conduct of Myers as amounting to a ratification of what Fisher had done. The difficulty is that what Fisher had done, he had done for himself, not ostensibly as agent for Myers. He was striving to bring about the exchange for his own advantage, and no more assumed to be agent for Myers as far as the proof shows than he assumed to be agent for the plaintiff. Fisher's personal interest was not concealed in any way from the plaintiff; in fact they must have known it when they received instructions to make the deed for the New York City property to Fisher. The doctrine of ratification is not applicable except where an agent has assumed to act for a principal but without authority. *Schlessinger v. Forest Products*

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Co., 78 N. J. L. 637, 641, is an illustration of the rule in a case of contract. The leading case as to torts is *Wilson v. Tumman*, 6 M. & G. 236. What Myers did was not to ratify any previous act done for him or in his name, but to enter into a contract at the request of Fisher made by Fisher on his own account and for his own benefit. The difference between entering into a contract and ratifying a contract already made is important. The ratification relates back to the unauthorized act; entering into a contract speaks only from the time it is made. The difference might be vital in the present case. If it were a case of ratification there would be room for the plaintiff's contention that Myers was liable for fraud of Fisher. There is no room for that contention on the facts of this case, since there is no claim that Fisher was guilty of any fraud later than April and then he did not assume to act for Myers, while Myers had nothing to do with the exchange until July.

The exceptions of the plaintiff are therefore not sustained.

The trial judge allowed the jury to render a verdict in favor of the plaintiff for \$625 and interest, upon the theory that it had been unable to collect past-due rent for that amount. Fisher and Myers had united in a document which amounted to an assignment of all uncollected rents, and in the settlement an allowance had been made for \$625 due from one of the tenants. The fact that the plaintiff failed to collect the \$625 would not entitle it to recover the amount of Myers unless he in some way guaranteed its collection. The evidence relied on to prove this guarantee is that of Brown who testified as follows, referring to a conversation with Fisher: "He assigned it to us but they said if we didn't get it, we will pay you. Q. Who was to pay in case you didn't get it? A. Mr. Myers and Mr. Fisher." There is no testimony that Myers was present at this conversation or assented to what Fisher said. Brown evidently was testifying only to his understanding of what Fisher meant. We are unable to find any evidence that Myers had authorized Fisher to make that agreement. It is true the \$625 rent belonged to Fisher, and Myers was with Fisher's permission credited with the

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\$625 in the adjustment; but Myers was on his part assenting to Fisher's receiving a deed for one of the three properties conveyed by the plaintiff in exchange, and he and Fisher must have made allowance for the \$625 in the arrangement between themselves which resulted in Fisher's securing the New York City property. In the absence of proof of Myers' assent, he was not responsible for Fisher's promise to make good the \$625 if the plaintiff failed to collect.

We think that for this error, the judgment in favor of the plaintiff should be reversed, but without costs. The record must be remitted for a new trial.

On the appeal of Charles R. Myers—

For affirmance—None.

For reversal—THE CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, WILLIAMS, TAYLOR, JJ. 13.

On the appeal of Brown Realty Company—

For affirmance—THE CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, WILLIAMS, TAYLOR, JJ. 13.

For reversal—None.

CHARLES F. McDONALD, APPELLANT, v. CENTRAL RAIL-
ROAD COMPANY OF NEW JERSEY, RESPONDENT.

Submitted March 27, 1916—Decided June 19, 1916.

1. The defence of fraud in the execution of a written instrument is available even though the defendant had ability and opportunity to read it, where the situation is such that the signer is under no duty to read.

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2. Where a release under seal is relied on as a defence, fraud in the consideration of the release is not available as a defence at law; there must be fraud in the execution to sustain the defence. *Connor v. Dundee Chemical Works*, 50 N. J. L. 257, approved.
3. A fraudulent misrepresentation of the contents of a release whereby the releasor is induced to execute it, is fraud in the execution of the release even though the misrepresentation is as to the statement of the consideration contained in the release.

On appeal from the Supreme Court.

For the appellant, *Charles M. Egan*.

For the respondent, *George Holmes (Edwards & Smith on the brief)*.

The opinion of the court was delivered by

SWAYZE, J. This is an action for personal injuries under the Federal Employers' Liability act. The defendant relied upon a release under seal. The plaintiff replied that the release was procured by fraud. The defence of fraud is available where one is induced thereby to sign a written instrument, even though he has ability and opportunity to read it. *Alexander v. Brogley*, 63 N. J. L. 307; *Aldrich v. Peckham*, 74 Id. 711, 716; *Dunston Litho. Co. v. Borgo*, 84 Id. 623. The exception where the situation imposes upon the signer a duty toward third persons (*Williams v. Leisen*, 72 Id. 410) had no application to the present case where only the plaintiff and defendant are concerned. *Dunston Litho. Co. v. Borgo* is sufficient authority for holding the defendant liable for the fraud of its agent where it seeks to avail itself of his acts. The only charge of fraud that we think important is that the agent of the defendant represented that the paper to be signed provided for the plaintiff's future employment. This was not the fact, and since the trial judge directed a verdict for the defendant, we must determine whether the evidence to that effect made it necessary to submit the question to the jury. This depends upon whether the evidence tended to

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prove fraud in the execution of the release or fraud in the consideration. The importance of the question arises from the fact that the action is not brought upon the release and the case does not therefore fall within the language of the statute permitting fraud in the consideration of the contract to be set up in an action at law. *Comp. Stat.*, p. 2225, § 15; *Connor v. Dundee Chemical Works*, 50 N. J. L. 257. It is then necessary to have clearly before us what the real consideration was, aside from the presumption afforded by the seal. According to the plaintiff, it was the promise of the defendant to pay the compensation provided for by the Workmen's Compensation act and give him future employment. According to the defendant it was merely a promise to pay the compensation provided by the act. Both contend that the consideration was a promise. The distinction between cases where the consideration is the promise and cases where the consideration is the performance of the promise is well pointed out by Chancellor Pitney in *United and Globe Rubber Manufacturing Co. v. Conard*, 80 *Id.* 286. He was there dealing with a case of failure of consideration not of fraud in the consideration, but where as in the pending case the consideration is a promise, there can hardly be fraud, unless perhaps if there is no present intention to perform. No such allegation is made in this case. The case differs entirely from *Stryker v. Vanderbilt*, 25 *Id.* 482. The plea there demurred to and held bad set up fraud by puffing at a public sale. The effect was to make the defendant pay more than he otherwise would, so that the consideration to be paid was fraudulently enhanced. It differs also from *Lord v. Brookfield*, 37 *Id.* 552, where the consideration of the bond was land conveyed to the obligor and the fraud consisted in misrepresenting its character and value. Fraud in the consideration means fraud in the inducement (in a legal sense) to the contract. In the pending case there was no fraud in the inducement to the contract. There may have been a misunderstanding as to what the consideration was, but there is no claim that it was misrepresented. The misrepresentation was of the contents

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of the release. The alleged fraud was not in the consideration itself, but in the statement that it had been expressed in the release, when in fact it had not. A misrepresentation of the contents of a document by which one is induced to sign a paper thinking it is other than it really is, is the typical case of fraud in the execution; it is a case where the defrauded party may properly say, "I never agreed to that, and hence the document is not my deed."

We think there was evidence of fraud in the execution, which should have been submitted to the jury. The judgment is reversed, without costs, and the record remitted for a new trial.

GARRISON, J. (dissenting). In a court of law the terms of a written contract cannot be varied by parole testimony, hence, the fact that by reason of false representations made to the defendant the terms of his contract are not as they were represented to him cannot be dealt with by a court of law.

If the defendant's contract lacks certain terms it was represented to contain, his remedy is in equity; it is only where what was signed by the defendant was not a contract, if the representations made to him were true, that a court of law deals with the question of fraud.

The cases dealt with at law, therefore, are those in which the writing signed by the defendant was represented not to be a contract although in fact it was one; the cases dealt with in equity are those in which the writing both purported to be and in fact was a contract, but did not express the terms it was represented to contain. In fine, the courts of law deal only with the question of contract or no contract, whereas, the Court of Chancery considers whether it is equitable that the contract should be enforced without reformation.

This distinction, which is made by our cases, was clearly appreciated by Judge Speer at the Circuit and correctly applied.

The judgment of the Supreme Court should be affirmed.

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Mt. Pleasant Cemetery Co. v. Newark.

For affirmance—GARRISON, TRENCHARD, TERHUNE, JJ. 3.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEP-PENHEIMER, TAYLOR, GARDNER, JJ. 12.

**MOUNT PLEASANT CEMETERY COMPANY, APPELLANT, v.
MAYOR AND COMMON COUNCIL OF NEWARK, RE-
SPONDENT.**

Argued March 9, 1916—Decided June 19, 1916.

1. The supplement of 1861 (*Pamph. L.*, p. 28) to the charter of the Mount Pleasant Cemetery Company does not amount to an ir-repealable contract to exempt property from taxation.
2. The exemption of cemeteries from taxation by the Tax act of 1903 (*Comp. Stat.*, p. 5083) does not include a tract of land be-longing to a cemetery company acquired by a separate deed and lying between high-water mark and the dock line of a tidal river, separated from the other cemetery property by a railroad, when only a small portion of the tract has been filled in, and none is now used for interments or likely to be so used in the near future.

On appeal from the Supreme Court.

For the appellant, *Henry H. Dawson* and *Chandler W. Riker*.

For the respondent, *Harry Kalisch*.

The opinion of the court was delivered by

SWAYZE, J. The question is the liability to taxation of a tract of land belonging to the cemetery company, which lies between high-water mark of the Passaic river, where the tide ebbs and flows, and the dock line. The tract is separated from the cemetery property by the tracks of the Erie Railroad

Company. A small portion has been filled in and is being prepared for interments, though not divided into lots. No lots have been sold and there have been no burials on the tract. Most of the tract is more or less covered with water at high tide so that interments could not be made. The tract is accessible only by crossing the railroad tracks from the cemetery proper, or from lands of other owners to the south, or from an ungraded and unimproved public street to the north. Exemption is claimed both under the special charter of the cemetery company and under the General Tax act of 1903. We deal first with the charter. By that act (*Pamph. L. 1844, p. 19, § 6*) the premises, burial lots, vaults, monuments, and other fixtures of the cemetery were exempted from taxation unless otherwise directed by the board of chosen freeholders of Essex county. That board in 1891 ordered that the cemetery company should be thereafter subject to taxes. No question arises therefore under the charter as originally enacted. The claim to exemption is rested on the supplement enacted in 1861 (*Pamph. L., p. 28*), which is said to amount to an irrevocable contract for an exemption from taxation of the property, assets and effects of the cemetery company, derived from the sale of lots in the cemetery. The tract now in question was an investment in 1881 of proceeds of such sales. If this contention is correct, the cemetery corporation has had two distinct contracts for exemption, one by reason of the charter subject to the control of the board of freeholders including the original cemetery and additions thereto up to 1861; one by the supplement, irrevocable and including property purchased since 1861 with the proceeds of sales of lots. So unusual a situation arrests attention at once. An examination of the supplement to the charter shows that the contention is untenable. The preamble begins by reciting the provision for exemption in the charter, and then proceeds: "And whereas, the said cemetery company are endeavoring to create a fund from the surplus proceeds of the sale of the lots of said cemetery, to provide means to preserve and maintain its enclosures and buildings and to pay the expenses of a proper care of the same; and whereas, doubts have

arisen whether by said act such surplus proceeds are exempt from taxes and assessments—therefore, to remove such doubts” it is enacted that the property of the company derived from the sale of lots, is exempted from all taxes and assessments, and the said surplus proceeds shall be held and used for the purposes mentioned. We think it clear that the object of the act was as the preamble declares it to be, merely to remove the doubts that had arisen as to whether the surplus proceeds of sales were exempt, and to place them on the same footing as the original property under the charter of 1844. This construction remedies the then existing difficulty in accordance with the declared purpose of the supplement and avoids the undesirable result of an irrevocable contract. That could not have been in the mind of the legislature at the stage which the discussion of such matters had reached after the enactment of the act of 1846 authorizing the legislature to alter, suspend and repeal charters. *Comp. Stat.*, p. 1600, § 4. If, however, the construction contended for were permissible, the act of 1861 would not amount to an irrevocable contract. It would lack the essential element of a consideration. There is no detriment to the cemetery company, and no benefit to the state. The supplement merely extends the privilege of exemption to a part of the company’s property as to which doubt, but apparently no controversy, had existed. The case in that respect is governed by *Hanover v. Camp Meeting Association*, 76 N. J. L. 65; affirmed, 76 *Id.* 827.

The Tax act of 1903 (*Comp. Stat.*, p. 5083) exempts from taxation graveyards not exceeding ten acres of ground, cemeteries and buildings for cemetery use erected thereon. Whether the tract now in question can be included under the word “cemeteries” is a question of definition. We have reached the conclusion that it cannot. The decisive considerations with us are—(1) That a tract the greater portion of which is still subject to the ebb and flow of the tide, only a small portion of which has been in fact reclaimed, none of which is now used for interments or likely to be so used in the near future, can only be called a cemetery by a figure of speech as the sea was called the cemetery of the Chateau d’If, or the ocean is

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often called a watery grave. We must interpret the language of statutes literally according to the ordinary meaning of words, not according to a meaning permitted only by poetic license; (2) The tract was acquired by a separate deed long after the rest of the cemetery property was acquired. It evidently is not necessary for cemetery purposes, however desirable it may be for the appellant to own it; (3) It is separated from the rest of the appellant's property by the Erie railroad tracks and is inaccessible for any practical purpose otherwise than by crossing these tracks. It is as distinct from what would ordinarily be called the cemetery, in physical location, as it is in character, as land covered with water is distinct in character from dry land. The importance of the separation of the cemetery company's property by the railroad seems to us as great in the present case as it was in a condemnation case where the owner's land was severed by the Morris canal. *Bergen Neck Railway Co. v. Point Breeze Ferry Co.*, 57 N. J. L. 163. We do not doubt that it may be desirable for the appellant to control this land under water in order to prevent possible nuisance in the future. So it might be important for the same purpose to control the land across the street from its main entrance. The appellant might think it desirable to tear down the buildings and prepare the land for possible use for interments in the more or less distant future, but we cannot believe it could thus withdraw the land from the tax levy. The line to be drawn is not a hard and fast line, but like so many other legal questions, one of reasonable definition under all the circumstances of the case. We think the tax was properly imposed and the judgment is therefore affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, BERGEN, MINTURN, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

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State v. Crivelli.

STATE, DEFENDANT IN ERROR, v. CAMILLE CRIVELLI,
PLAINTIFF IN ERROR.

Submitted March 27, 1916—Decided June 19, 1916.

1. On the trial of a man for murder of his wife by poison with morphine or laudanum, it was proper to admit evidence (1) of a physician who made the *post mortem* examination that the condition of the brain and blood led him to suspect poison; (2) of a chemist that a jar handed him contained a liquid "said to be the stomach contents" of one whose death was attributed to poison, where the liquid was proved by witnesses from whom the chemist received his information to be what it was said to be; (3) of a chemist who had examined the contents of the deceased's stomach as to the quantity of morphine or laudanum that was likely in the system of the deceased or in the stomach prior to death; (4) to show defendant's relations with another woman and his effort to resume sexual relations with her just before his wife's death; (5) that there was a lack of any appearance of grief on his part at his wife's death; (6) of an expert witness as to what portion of four grams of morphine or opium would likely be absorbed through the system; (7) it was also proper to cross-examine the defendant as to whether he had expressed the pleasure he had had in his intercourse with the other woman, and upon his denial, to call the witness to contradict him.
2. A charge, in reply to the jury's question whether they must accept circumstantial evidence, that they must accept all evidence, coupled with the charge that it was a question of what they believed of the testimony, was proper.

On error to the Union Oyer and Terminer.For the state, *Alfred A. Stein*.For the plaintiff in error, *J. Victor D'Aloia*.

The opinion of the court was delivered by

SWAYZE, J. The defendant was convicted of the murder of his wife by administering laudanum. Most of the questions raised relate to the admission of evidence.

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1. We see no error in allowing the physician, who made the *post mortem* examination, to testify that the condition of the brain and blood led him to suspect poison. It was merely an explanation of his subsequent action which resulted in finding poison in the stomach of the deceased.

2. The objection that the chemist testified that a jar handed to him contained a liquid which was "said to be the stomach contents" of the deceased is untenable. The language was the cautious expression of the witness. That the liquid was in fact what it was said to be was proved by witnesses having knowledge from whom the chemist had received his information.

3. We see no valid objection to the chemist testifying as to the quantity of morphine or laudanum that was likely in the system of the deceased, or in the stomach prior to death. He knew the quantity actually found; he had expert knowledge which enabled him to tell whether any had probably been absorbed in her system; he did not attempt to specify the quantity with exactness, but merely testified that there was a large quantity present, considerably larger than was found; that such was certainly the fact if death resulted from a dose of the drug. This was no more than saying that the quantity actually found probably was not sufficient to produce death, but that its presence indicated that more had been taken than was found. This is well within the bounds of his knowledge as an expert.

4. The testimony as to Mrs. Ludka's conversation with the defendant about his relations with Mrs. Meyer was competent, because it showed his effort, just before his wife's death, to resume the sexual relations with Mrs. Meyer which had been interrupted at the time of his assault a few months before upon the man with whom she was living as a wife. His relations with Mrs. Meyer furnished an explanation of, if not a motive for, the alleged act of poisoning his wife, and tended strongly to corroborate the theory of the state. For the same reason the testimony as to the assault on Meyer was permissible. It formed a part of the history of the relations between the defendant and Mrs. Meyer and explained

their discontinuance and the efforts made by the defendant to have them resumed, and rendered it more probable that he would seek to remove any obstacle that there might be to the resumption of those relations.

5. We see no objection to the evidence as to the lack of any appearance of grief on the part of the defendant at the death of his wife, who had come to him with his daughter from Italy only a few days before.

6. It was proper to ask Dr. Mravlag, as an expert, what portion of four grams of morphine or opium would likely be absorbed through the system. His answer seems to have been that he did not know—an answer which was harmless—and his testimony the next day that the drug was absorbed more or less rapidly, depending upon the form it was in, was relevant to the claim that the amount actually found was only a part of what must have been taken by the deceased.

7. It was proper to ask the defendant on cross-examination if he did not express to Giordano the pleasure he had had in his intercourse with Mrs. Meyer, and upon his denial, to call Giordano to contradict him. The matter was not a collateral matter, but bore directly upon the state's case. Whether it should have been allowed in rebuttal, as it was, was a matter within the discretion of the trial judge, and that was not abused.

8. The objections to the charge of the court do not raise any question of law. They go rather to the court's way of stating the questions as to the facts for the jury to decide. The judge seems to have stated them with entire fairness. He certainly went no further than is permitted under our practice. His reply to the jury's question whether there was any direct evidence that the drug was administered by the defendant, was merely a statement of the evidence and an instruction that it was for the jury to say whether it was direct or not, depending on what they found the facts to be. His reply to the question whether the jury must accept circumstantial evidence was proper. When he said they must accept all evidence, he clearly meant only that they must receive all evidence that the court thought admissible, not that

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they must credit it all; for he immediately said it was a question of what they believed, of the testimony.

We find no error and the judgment is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, MINTURN, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 14.

For reversal—None.

LOUIS C. HARTDORN AND WILLIAM H. RADCLIFF,
PLAINTIFFS IN ERROR, v. THE WEBB MANUFACTURING
COMPANY, DEFENDANT IN ERROR.

Argued March Term, 1909—Decided February 26, 1910.

1. Webb, the secretary, superintendent and manager of a manufacturing corporation, caused the arrest of the plaintiffs, two former employes of the company, for the larceny of certain articles, the property of the company, found in their possession. The plaintiffs claimed that Webb had given them these articles, but of this claim the corporation had no actual notice. The plaintiffs were tried and acquitted of the charge, and they then brought an action against the company for malicious prosecution. Webb had no express authority, nor had he any implied authority to give away the property of the company, and the gift, if made, was a personal matter between him and the plaintiffs, and so knowledge of the gift was a fact not imputable to the corporation. The other facts, knowledge of which by Webb was imputable to the company, in the absence of notice that plaintiffs claimed the articles by gift from Webb, were such as to create a probable cause for the company to believe that the plaintiffs were guilty of larceny.
2. Where the facts are not in dispute, the question of probable cause, in actions for malicious prosecution, is one of law.

NOTE.—This opinion was rendered at the November Term, 1909, and should have been published with the opinions of that term, but was overlooked by the reporter.—REP.

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On error to the Supreme Court.

For the plaintiffs in error, *Patrick J. Dolan* and *Michael J. Tansey*.

For the defendant in error, *Herbert W. Knight* and *John A. Bernhard*.

The opinion of the court was delivered by

REED, J. Two judgments on verdicts directed for defendants are brought up by separate writs of error. One is in the case of *Louis C. Hartdorn v. The Webb Manufacturing Company*, and the other judgment is in the case of *William H. Radcliff* against the same company. The writs of errors in both cases were argued together.

Both actions were for malicious prosecution. They were tried together, and upon the trial there were directions of verdicts for the defendants.

The question propounded is whether the plaintiffs, or either of them, were entitled to go to the jury.

The skeleton of facts is that both plaintiffs were arrested on the complaint of *Hartwell W. Webb* for stealing articles from the *Webb Manufacturing Company*. Both were indicted, tried and acquitted. For this arrest the actions were brought.

The complaint upon which the arrest of the two plaintiffs was made was signed and sworn to by *Hartwell W. Webb*. The complaint stated that *Radcliff* and *Hartdorn* did feloniously steal and carry away brass fixtures, parts of speed indicators, pinions, clamps, gears, and flexible shafts of the valuation of \$500 from the premises of the *Webb Manufacturing Company*, at the corner of *Columbia* and *Green* streets, in the city of *Newark*; also at 60 and 62 *Shipmant* street; said *Webb Manufacturing Company* being the owners of said property in conjunction with one *Edward H. Webb*. This complaint was sworn to on August 21st, 1906.

It appears that both *Radcliff* and *Hartdorn* had been employed by a company known as the *Webb Company*. This company was changed to the *Webb Manufacturing Company*

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on January 12th, 1906. Hartdorn had begun his service with the old company in November, 1904, and remained with the old and the new companies until March 28th, 1906. When Radcliff began his work with the old company is not stated with precision, but he left the service of the new company at the time of his arrest in August, 1906.

The business of the Webb Manufacturing Company was at first the manufacture of speed indicators, and afterward the manufacture of speed odometers, in connection with the indicators; and then to connect the one of these with the other, it manufactured a flexible shaft. Radcliff says that he was foreman and toolmaker in the Webb Manufacturing Company's service. In the latter part of 1905 Hartdorn began, and in January, 1906, effected an organization called the National Flexible Shaft Company, in which company he interested Radcliff, and financially, one Mr. Racine. The business of this company was, among other things, the manufacture of flexible shafts, and so was a competitor of the Webb Manufacturing Company. Both Radcliff and Hartdorn, while still working for the Webb Manufacturing Company, were experimenting and manufacturing, or trying to manufacture, flexible shafts; and Hartdorn, after leaving the Webb's, devoted himself to this work.

Mr. Hartwell W. Webb, who was the active person in the operation of the plant of the Webb Manufacturing Company, says that some time in June, 1906, he received information from a Mr. Tucker that he, Tucker, suspected that Hartdorn and Radcliff were making flexible shafts. Mr. Webb says that on August 16th he received a visit from Mr. Racine, already mentioned, who asked Webb whether he knew that Hartdorn and Radcliff were in business, and said that he, Racine, came to see Webb because he did not wish to involve himself in any action that might be brought against him with reference to the things he had found on the premises; that he, Racine, told Webb that he was treasurer of the National Flexible Shaft Company; that he had found gears and brass clamps and stuff there to account for which he had found nothing on the books; that Hartdorn and Radcliff had re-

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quested him to give a bond as treasurer, and that he would not do so until he was sure where the stuff came from; that Racine told him, Webb, that he was first led to suspect something wrong when some person came up there and told Racine and Hartdorn that some one was coming up from the Webb Company, when Hartdorn immediately got down on the floor and began to scrape up some clamps that were used for binding the ends of the flexible shaft, of which there were eight or ten pounds there. That Racine further said that Hartdorn and Radcliff were talking about a gear; that Hartdorn had told Radcliff to get as many of these as he could before he left Webb's.

After this conversation with Racine, Mr. Webb consulted his brother, Mr. E. H. Webb. These two, with Mr. Racine, went to see Mr. Helm, the lawyer of the company, but, not finding him, they went to police headquarters and asked for an officer to go with them to the factory of the National Flexible Shaft Company. The officer at police headquarters advised them to first go to that place with Mr. Racine, who was an officer of the company. This they did. There, Mr. Webb says, he found a lot of articles which he recognized as formerly manufactured by and belonging to the Webb Manufacturing Company. Many of these were taken to the police station. This was on Sunday, and on Monday they found and consulted Mr. Helm, the lawyer, and after stating the facts to him he advised them that there was a ground for a charge of larceny, and probably of embezzlement. Helm advised a consultation with Judge Skinner, to whom Webb again detailed the facts, and Judge Skinner advised a charge of larceny. A search warrant was issued, under which the plant of the National Flexible Shaft Company was examined, a gear found, and afterward a complaint appears to have been made and a warrant issued for the arrest.

The plaintiffs admitted that many, indeed most of the articles found by Mr. Webb had been taken away from the factory of the Webb Manufacturing Company and had been the property of the Webb Manufacturing Company, but they insisted that every article had been given to one of them by

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Mr. Hartwell W. Webb. Radcliff says that about a month or six weeks after the Webb Manufacturing Company was formed, Mr. Hartwell W. Webb told him to gather together all the materials that were around the place for the purpose of selling them to a dealer named Schueler; that Mr. Hartdorn asked for a few of the castings, and he was told that he could take them, and that he did so.

Hartdorn says that he was told that he could take some gears out of the same scrap. He also says that Mr. Webb had given him lots of things at different times, which things he threw away when he moved to Franklin street. Among other things, Webb had given him a bevel, which was produced at the trial.

As already observed, the trial court, at the close of the testimony, directed a verdict for the defendant in both cases. In reviewing this direction, it is to be observed that there was no express direction by the board of directors of the Webb Manufacturing Company that Mr. Webb should cause the arrest of these persons; nor was any general authority given to Mr. Webb to cause the arrest of any person suspected of larceny of the company's property. Nor did the official relations between the Webb Manufacturing Company and either of the Messrs. Webb imply a power in them to act for the corporation in causing such an arrest. Mr. Hartwell W. Webb was the secretary, and Mr. Edward H. Webb the treasurer of the company. Upon neither of such officers was there conferred *ex virtute officii* a power to bind the corporation by causing criminal process to issue against the plaintiffs.

But it is insisted that Mr. Hartwell W. Webb was more than secretary; that he was the active manager and superintendent of the manufacturing business carried on by the corporation, and so had supervision over the materials manufactured, and the materials and machinery used in its manufacturing business.

The responsibility of a corporation for an arrest caused by its agent in the performance of his duty to protect or recover the property of the corporation, need not be discussed. It

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need not be discussed, for, assuming that if the Webb Manufacturing Company had been possessed of a knowledge of all the facts which might have been known to Mr. Webb, or, assuming that the knowledge of such facts as Webb possessed was imputable to the corporation, the corporation would be liable for Webb's acts—nevertheless, we think the direction of the verdicts was right.

The question involved is not whether Mr. Webb had probable cause to believe that the plaintiffs were guilty of larceny of the articles—the property of the corporation found in the plaintiffs' possession; but the question is whether the corporation had cause for such belief. If the facts actually or constructively known to the corporation were such as to lead it to think that there was a probable cause for the plaintiffs' arrest, that fact would afford a clear legal defence to the corporation in an action brought by the plaintiffs for malicious prosecution in causing their arrest; and if the facts actually or constructively known to the corporation existed indisputably, then whether such probable cause existed was a question of law.

Now the fact that the property alleged to have been stolen was the property of the corporation; the fact that it had been taken away by Hartdorn; the fact that it was found on the premises of the plaintiffs; the fact that Racine had communicated to Webb the circumstances already detailed—are undisputed existing facts. Assuming that knowledge of these facts were known to the corporation because they were known to Webb, the company would have had reasonable ground to believe that the articles had been stolen by the plaintiffs.

Now the fact upon which the plaintiffs rested their defence was that Mr. Webb had given to Hartdorn the articles alleged to have been stolen. Webb indeed, denied this; but, assuming it as a disputed fact, it is still undisputed that no actual knowledge of this claim by the plaintiffs ever came to the corporation, therefore, to put the corporation in the position of having acted with this knowledge, it must be assumed that the knowledge of the alleged act of Webb in giving to the

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plaintiffs this property is imputable to the corporation because Webb was its agent. But it is perceived that while Mr. Webb may have had the power to act for the company in preserving, or even selling the property of the corporation, he had not a shred of authority to give away the property of the company. Such a transaction was a purely personal matter between himself and Hartdorn. Indeed, Hartdorn knew—according to his own statement—that Webb was so dealing with the property surreptitiously, for Hartdorn says that Webb remarked at the time that scrap was gathered out of which the property was taken: "Hurry up, because I don't want none of the stockholders to walk in and see it, because what they don't know won't hurt them." But disregarding this remark, it is clear that the alleged act of Mr. Webb in so dealing with the property of the corporation was entirely aside from his authority, as such authority appears in the testimony, and his act was one entirely personal to himself. Knowledge of the fact that Webb had given the property to Hartdorn was, therefore, not imputable to the corporation.

The principle which underlies this rule is illustrated in the case of *Graham v. Orange County Bank*, 59 N. J. L. 225, and in the line of cases collected in the note to be found in 6 *Am. & Eng. Anno. Cas.* 679.

So, if all knowledge of the other facts, namely, the fact that Webb had been told by Racine of the circumstances already set out, the fact that the articles had been in the possession of the Webb Company, the fact that they were in the possession of the plaintiffs, the fact that no sale of these articles had been made—were impliedly known to the company, yet in the absence of any imputed knowledge that the articles had been given to the plaintiffs by Mr. Webb, there was probable cause apparent to the corporation for thinking that the plaintiffs were guilty of larceny. Therefore, whatever may have been the right of action against Hartwell W. Webb, the action properly failed against the defendant.

The judgments upon the direction of the verdicts should be affirmed.

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• Gaskill v. Atlantic City.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, JJ. 15.

For reversal—None.

EDMUND C. GASKILL, JR., PLAINTIFF AND APPELLANT,
v. ATLANTIC CITY, DEFENDANT AND RESPONDENT.

Argued March 21, 1916—Decided June 19, 1916.

An unauthorized person who gains possession of a public office by force, and with full knowledge that his title thereto is disputed by the lawful incumbent, has no right of action against the public for the prescribed salary during such usurpation.

On appeal from a judgment of the Supreme Court.

For the appellant, *Bourgeois & Coulomb*.

For the respondent, *Clarence L. Cole* and *Theodore W. Schimpf*.

* The opinion of the court was delivered by

TRENCHARD, J. Martin E. Keffer was appointed recorder by the commissioners of Atlantic City on July 23d, 1912.

His term as provided by law was for three years.

In the fall of 1914 the city clerk gave notice that the office of recorder would be filled at the general election. This notice was given upon the erroneous assumption that by the operation of the Walsh act (*Pamph. L.* 1911, p. 462), which Atlantic City had adopted, the term of the recorder expired January 1st, 1915, and was to be filled at the preceding general election.

Proceeding upon this erroneous theory, Edmund C. Gaskill, Jr., the plaintiff in this suit, was nominated and elected at the general election held November 3d, 1914.

On October 29th, 1914, shortly prior to the general election, the commissioners adopted a resolution recognizing the validity of Mr. Keffer's election for a term of three years and providing for payment to him of the salary attached to such office "until such time as the proper judicial tribunal of the state declare otherwise," and of this resolution Mr. Gaskill was cognizant.

On November 30th, 1914, Mr. Gaskill, conceiving that he was entitled to the office, immediately sent a letter to Mr. Keffer demanding that he, Keffer, surrender the office, to which Mr. Keffer replied, refusing to surrender and stating in effect that he was entitled to hold the office for the full term of three years from the time of his election by the commissioners.

Thus matters stood until December 31st, 1914, when the commissioners adopted a resolution "recognizing" the election of Mr. Gaskill as valid.

On the afternoon of December 31st, 1914, Mr. Gaskill, in the absence of Mr. Keffer, entered the office of the recorder and gave instructions for the changing of the combination of the safe and locks on the drawers of the desk, so that on the morning of January 1st, 1915, they were closed to Mr. Keffer, though from day to day he tendered himself at the city hall ready to perform the duties of his office.

Immediately after being thus ousted, Mr. Keffer began proceedings in *quo warranto* against Mr. Gaskill, who was in possession, exercising the functions of the office. Shortly thereafter the legislature passed an act, the purpose of which was to validate the election of Mr. Gaskill. *Pamph. L. 1915, p. 659.* Mr. Gaskill was instrumental in securing the passage of this act, he having handed the original to a member of the legislature. This act was brought to the attention of the Supreme Court and its effect considered in the *quo warranto* case then pending. The court held that the appointment of Mr. Keffer was for a term of three years, from July

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23d, 1912, and that the validating act was unconstitutional. A judgment of ouster was entered against Mr. Gaskill. *Kef-fer v. Gaskill*, 88 N. J. L. 77.

Thereupon Mr. Gaskill brought this suit against Atlantic City for the salary of recorder from January 1st, 1915, to July 23d, 1915, that being the period during which he had transacted the business of the office.

The trial judge, at the Atlantic Circuit, upon the foregoing matters of fact appearing, directed a verdict for the defendant and the plaintiff appeals from the consequent judgment.

We are of the opinion that the judgment must be sustained.

The case of *Stuhr v. Curran*, 44 N. J. L. 181, is not in point. There S. and C. were opposing candidates for the office of chosen freeholder. C. received the certificate of election from the board of canvassers, and performed the duties of the office for six months, having no reason to doubt that he was legally elected. He was subsequently ousted by S. on *quo warranto*. It was held that an action could not be maintained by S. against C. to recover the fees of the office received by the latter while he was in possession of the office. It will be observed that, in that case, there was concededly a vacancy, and the person who assumed to fill the office had no reason to doubt that he was legally elected.

In the present case there was no vacancy either in law or in fact, and the plaintiff knew that his claim to the office was seriously challenged by the incumbent. Indeed, he knew before the election that if elected his right to the office and its salary would be questioned.

This case is more like *Meehan v. Freeholders of Hudson*, 46 N. J. L. 276, where it was held that an unauthorized person gaining possession of a public office by force or fraud had no right of action against the public for the prescribed salary for services rendered during such usurpation. In that case the plaintiff, with full knowledge that the office to which he was nominally elected was already filled, and that no vacancy existed at the time of his appointment, forcibly ousted the in-

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cumbent under color of a resolution which he knew was invalid. In the present case we do not attribute any such fraud or sinister conduct to the plaintiff. But, concededly, he knew that Mr. Keffer disputed his title. Concededly, he participated in the forcible ousting of Mr. Keffer.

In *Blore v. Board of Freeholders*, 64 N. J. L. 262, it was held that one who by force retains possession of a public office after the expiration of his term, and against the lawful demand of his legally-appointed successor, cannot recover the salary or emoluments attached to the office accruing after such demand. The only distinction between that case and this is the distinction between forcible and illegal retention and forcible and illegal intrusion. If Mr. Keffer had succeeded in holding on to the office, and his title had been held bad, the situation dealt with in the *Blore* case would have been presented. Now, we think that the same rule should apply when the unlawful claimant has ousted the lawful one. In other words, we think that an unauthorized person who gains possession of a public office by force, and with full knowledge that his title thereto is disputed by the lawful incumbent, has no right of action against the public for the prescribed salary during such usurpation. Clearly, Mr. Gaskill, if he had faith in his claim, should have brought *quo warranto*, and, if he had succeeded, he would have been entitled to the salary for the term. Instead thereof, he took the law in his own hands, to the detriment of the public peace, and forcibly ousted the lawful incumbent of the office who was engaged in the discharge of its functions.

The judgment of the court below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

For reversal—None.

MASON B. SPOFFORD, ADMINISTRATOR, &c., OF WILLIAM RYAN, DECEASED, PLAINTIFF AND RESPONDENT, v. CENTRAL RAILROAD COMPANY OF NEW JERSEY, DEFENDANT AND APPELLANT.

Argued March 20, 1916—Decided June 19, 1916.

1. The relation of carrier and passenger, when established, does not terminate until the passenger has reached his destination and alighted from the train upon which he has been riding, and has had a reasonable time and opportunity within which to leave the place where the passengers are discharged.
2. It is the duty of a railroad company to use reasonable care to provide its passenger a safe place and way to alight at the place of destination, and the company is liable for an accident happening by reason of the neglect of such duty to a passenger who has alighted from a car at rest in a station, and before he has had a reasonable time and opportunity to leave the premises of the company, if the circumstances are such as to induce the passenger to believe that it was safe for him to alight at the place and in the way he did.
3. Whether a person who has alighted from a standing train at a station, and who is crossing the railway tracks by a planked way provided by the company for that purpose, after the train has moved out, is still a passenger entitled to so cross without looking and listening, is a question of fact for the jury, where, under the proof, reasonable men may differ as to whether he was proceeding from his place of alighting to a place of safety within a reasonable time after he had alighted from the train.

On appeal from the Hudson County Circuit Court.

For the appellant, *Charles E. Miller and Edwards & Smith.*

For the respondent, *William D. Salter and Aaron A. Melniker.*

The opinion of the court was delivered by

TRENCHARD, J. This suit was brought by the administrator of William Ryan, deceased, to recover damages for his death alleged to have been caused by the negligence of the defendant company.

The evidence at the trial justified the jury in finding, among others, the following matters of fact:

Ryan, the decedent, a resident of New York City, was a passenger on the train of the defendant company running from Jersey City to Forty-ninth street, Bayonne, and points beyond, and due to arrive at Forty-ninth street at eleven-six P. M.

He alighted at the latter station and was killed by an express train running in the opposite direction. This express did not stop at Forty-ninth street, but by its running time was due to pass there about eleven-seven P. M.

The station building at Forty-ninth street is on the west side of the tracks. There are four tracks there. The two nearer the station building carrying the trains from Jersey City; those upon the other side carrying the traffic to Jersey City.

The train from which the decedent alighted was a local train running upon the second track, counting from the station building. The train which struck decedent was running upon the third track.

Aside from the light which came from the station window, the only illumination at the station at the time came from four gas lights of the ordinary gas-tip-burner type, one at each corner of the station building. Across the tracks, on the easterly side, some distance away, was the Pennsylvania railroad yard, with lights here and there, presenting at night somewhat the appearance of a built-up section. In front of the station, opposite the bay window, there was a plank walk eight feet wide running across the tracks from the station to the westerly rail of the far track. The remaining space in front of the station was filled in with cinders between the tracks and rails. There was no fence or gates between the tracks, no tunnel, nor overhead bridge. There was a crossing bell at the station which rang for trains coming from Jersey City but not for trains going towards Jersey City.

The decedent got off the train on the side opposite the station building. When struck he was upon the plank walk extending across the track on which the express train was

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running. He had a return coupon to New York in his pocket.

The trial resulted in a verdict for the plaintiff and the defendant appeals from the consequent judgment.

The sole complaint now is that the trial judge declined to nonsuit and to direct a verdict for the defendant.

We are of the opinion that such motions were properly denied.

It is admitted that the decedent was a passenger upon the defendant's train.

The relation of carrier and passenger, when established, does not terminate until the passenger has reached his destination and alighted from the train upon which he has been riding, and has had a reasonable time and opportunity within which to leave the place where the passengers are discharged. *Delaware, Lackawanna and Western Railroad Co. v. Trautwein*, 52 N. J. L. 169.

Consequently it is the duty of a railroad company to use reasonable care to provide its passengers a safe place and way to alight at the place of destination, and the company is liable for an accident happening by reason of the neglect of such duty, to a passenger who has alighted from a car at rest in a station, and before he has had a reasonable time and opportunity to leave the premises of the company, if the circumstances are such as to induce the passenger to believe that it was safe for him to alight at the place and in the way he did. *Falk v. New York, Susquehanna and Western Railroad Co.*, 56 N. J. L. 380; *Delaware, Lackawanna and Western Railroad Co. v. Trautwein*, 52 *Id.* 169.

Tested by this rule we think the question of the liability of the defendant company was for the jury.

It was admitted that the train upon which decedent was riding had stopped at the station for the purpose of discharging passengers. Whether the circumstances were such as to induce the decedent to believe that it was safe for him to get off the train on the side away from the station building was a jury question. The evidence tended to show that he was not familiar with the station or its surroundings. It is

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said that he intended to visit a person living on the west side of the tracks, and that the city was not built up on the east side upon which he alighted. That may be so. But it was permissible from the evidence to conclude that the station was not well lighted and the night was dark, and it may well be that the decedent was misled by the distant lights in the railroad yard on the east side, and so naturally made the mistake of alighting upon that side. A stranger arriving at his station cannot always stop to take into consideration all the surroundings. The fact that there was a platform on the side where he alighted, leading across the track where he was hit, was another one of the circumstances all of which rendered it possible and legitimate for the jury to conclude that the circumstances were such as to induce the decedent to believe it safe for him to alight as he did. That being so, the question arises was it open to the jury to find that the defendant company failed in the performance of its duty to use reasonable care to render safe the place and way used by the decedent? We think that it was. It was a permissible assumption that the defendant company knew or ought to have known that a passenger upon the local was likely to get off on the east side of the train in the absence of notice to the contrary. The company knew that the express train was due to pass on the adjacent parallel track on the east side at the time or shortly after the local discharged its passengers. Now we do not say that it was the positive duty of the company to have provided a fence between the tracks; nor do we say that it was its positive duty to have provided gates upon the local train to prevent passengers from alighting upon the side along which the express would pass. But we do say that it was open to the jury to find that there was a want of reasonable care in its failure to take any precaution whatever. The jury may well have found that ordinary prudence upon the part of the railroad company, under such circumstances, required it to inform its passengers which of the two ways of alighting was intended to be used upon that occasion, or to in some way obstruct the one not so intended in such manner as to give notice of the fact.

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But it is contended that "under the evidence the defendant owed no duty to the decedent at the time of his injury other than the duty owing to a mere licensee of refraining from willful or wanton injury, because he had ceased to be a passenger."

But we think that it did not conclusively appear that the decedent had ceased to be a passenger.

The defendant rests its contention in this regard entirely upon the claim that it conclusively appeared that the express passed the Forty-ninth street station three minutes after the local, upon which decedent was a passenger, had pulled out. But this contention is not well founded in fact. It did not so conclusively appear. No witness assumed to definitely fix the time of passing of the express with relation to the clearance of the local. There was evidence that the local was due at Forty-ninth street at eleven-six P. M.; that the express was due to pass Eighth street at eleven-two P. M., and generally took about five minutes to run to Forty-ninth street, which would bring it to Forty-ninth street about eleven-seven P. M. or just about the time the local was discharging its passengers. This was the testimony of the company's engineer. The witness Kiernan testified that there was usually about thirty seconds between the passing of these trains at the Forty-ninth street station. This and other evidence, which it is unnecessary to quote, permitted of the inference that the express passed at the time, or very shortly after, the local discharged its passengers.

Concededly the decedent alighted upon the planked way. This led across the track upon which the express was coming. It was a fair inference that decedent was either crossing or momentarily hesitating, trying to find his way in the dark.

If the train from which he had alighted had not yet pulled out, of course the argument of the defendant upon this phase of the case has no basis for its support. If it had pulled out, a jury question was presented. The rule is this: Whether a person who has alighted from a standing train at a station, and who is crossing the railway tracks by a planked way provided by the company for that purpose, after the train from

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which he has alighted has moved out, is still a passenger entitled to so cross without looking or listening, is a question of fact for the jury, where, under the proof, reasonable men may differ as to whether he was proceeding from his place of alighting to a place of safety within a reasonable time after he had alighted from the train. *Atlantic City Railroad Co. v. Kiefer*, 75 N. J. L. 54.

We conclude, therefore, that the case was properly submitted to the jury.

The judgment below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

For reversal—None.

ABRAHAM EISLER AND ESTHER EISLER, PLAINTIFFS-
APPELLANTS, v. SOLOMON M. HALPERIN AND RACHEL
HALPERIN, DEFENDANTS-RESPONDENTS.

Submitted March 27, 1916—Decided June 19, 1916.

1. Since the amendment of 1910 to section 30 of the District Court act, District Courts have had jurisdiction to try causes wherein the title to land is in question, within the limits set by that section as amended.
2. A vendee is not obliged to accept a title substantially defective, and on rejecting the deed for good cause may demand and sue for the return of money paid on account of the purchase.
3. When the sufficiency of a real estate title is in question in a court of law, that court may receive and consider evidence tending to show that the title is vulnerable in equity.
4. Delivery of possession is normally essential to the transfer of a good title, and a vendee may reject a title not accompanied by immediate possession, unless the agreement be otherwise.

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On appeal from the Supreme Court, whose opinion is reported in 85 N. J. L. 139.

For the appellants, *Samuel F. Leber*.

For the respondents, *Benjamin M. Weinberg*.

The opinion of the court was delivered by

PARKER, J. The suit was for the recovery back of money paid on account of the purchase price of real property by reason of defect in the title and inability to deliver possession. The District Court gave judgment for the plaintiffs, and in the Supreme Court this was reversed, on the ground that the trust with which plaintiff claimed the property was affected was not manifested by writing, as required by the statute of frauds, and therefore the testimony about it was irrelevant and immaterial. The court does not discuss the claim made by plaintiff that defendants were unable to deliver possession, as found by the trial judge. The Supreme Court also held, on the authority of *Tapscott v. McVey*, 82 N. J. L. 35, that since the amendment of 1910 to section 30 of the District Court act (*Comp. Stat.*, p. 1962), which struck out the proviso withholding jurisdiction of actions wherein the title to lands and real estate shall come in question (see *Pamph. L.* 1898, p. 564), District Courts have had jurisdiction to pass on questions of title to land within the limits set by that section as amended. With this last conclusion we agree. The change in the statute is an abrogation to this extent of the rule laid down in *Buttoro v. Whalen*, 64 N. J. L. 461, and the District Court therefore properly entertained the action.

On the other points of the case, however, we reach a result different from that reached by the Supreme Court. So far as the facts are recited in the opinion of that court, *ubi supra*, they need not be repeated. The rule is elementary that, in the absence of any qualifying conditions in the contract of sale (and there were none in this case), the purchaser is en-

titled to a good title. If the title be not such as the purchaser is entitled to under his contract, he may, after a proper tender, or without it in cases where it is waived or excused, rescind the contract and recover back in an action at law what he has paid on it. 29 *Encycl. L.* (2d ed.) 619; *Meyer v. Madreperla*, 68 N. J. L. 258, 266. The principle is recognized in this state by such cases as *Weimar v. Fath*, 43 Id. 1; *Buttoro v. Whalen*, *supra*; *Gerbert v. Trustees*, 59 Id. 160, and *Mangonaro v. Karl*, 84 Id. 408. We have in this state a line of cases holding that equity will not decree the specific performance of such a contract if it will result in compelling the purchaser to take a doubtful title. *Dobbs v. Norcross*, 24 N. J. Eq. 327, a decision of Chancellor Runyon, is a leading example. Recent cases in this court are *Van Riper v. Wickersham*, 77 Id. 232, and *Doutney v. Lambie*, 78 Id. 277. There may be some cases where equity would refuse relief to a vendor on account of doubtful features of title that nevertheless would not support a rescission by vendee and a suit for recovery back of purchase-money paid; but if there be a substantial defect, the vendee may rescind and recover back his payments and interest if the title has not passed. Illustrative cases are *Moore v. Appleby*, 108 N. Y. 237 (lack of proper parties in a partition suit); *Fruhauf v. Bendheim*, 127 Id. 587 (outstanding privilege of renewing a lease), and *Simon v. Vanderveer*, 155 Id. 377 (filed *lis pendens* and complaint stating a good cause of action, although unfounded in fact). In the case at bar, plaintiffs had notice that Halperin held by a deed that was tantamount to a mortgage, *i. e.*, given to secure money loaned, and under an oral agreement with Blacher, his grantor, that in case of a sale Halperin would account for all moneys received over and above the loan. The Supreme Court held that this was an oral trust and unenforceable under the statute of frauds. But what section 3 requires is that trusts shall be "manifested and proved" by writing in order to be enforceable, and as was held by this court in *Jamison v. Müller*, 27 N. J. Eq. 586, 592, the writing may be brought into being after the creation of the trust, and even after the intervention of creditors by attachment. If ef-

fective against attaching creditors without notice, it should also be effective against subsequent purchasers with notice; so that the claims of plaintiffs under the deed of Halperin, if they accepted it with notice of this parol trust, were subject to impairment or defeasance thereafter by the expression or evidencing of that trust in writing. That it was a trust to sell would not materially help the matter, for its terms may have contained a limitation on price or some restriction that would invalidate Halperin's deed as trustee. Apart from this, if the deed from the Blachers to Halperin was in fact only a mortgage, this could be shown by parol evidence. *Cake v. Shull*, 45 *Id.* 208.

It is true that Blacher was present at the time fixed for passing title, and probably would be estopped from impeaching a deed by Halperin. Blacher's wife, however, was not present. Plaintiff's attorney demanded a release of her dower and was informed that she was in Europe and would not return for several weeks. Even if the interest of Blacher was purely equitable, his wife would be entitled to dower in it. *Cushing v. Blake*, 30 *N. J. Eq.* 689. From all which considerations it should sufficiently appear that for the Eislers to accept the title proffered would lay them open to a fair probability of vexatious litigation with the possibility of serious loss. A title in that condition is plainly unmarketable and substantially defective, and a purchaser is justified in refusing to accept it.

As to the propriety of the testimony about the parol trust, or the deed as a mortgage, the question under investigation by the District Court was whether the title was one which the purchaser was entitled to reject in its then state, and in solving that it was entitled to receive any evidence that tended to show the openings for attack on the title, whether at law or in equity. On the whole, we consider that plaintiffs acted lawfully in rejecting the title and in demanding their money back, and were entitled to sue for it at law.

There is another ground for supporting the judgment of the District Court that does not seem to have been discussed by the Supreme Court, viz., that defendants were unable to

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put plaintiffs into possession. Plaintiffs notified defendants at or about the time of executing the agreement of purchase in December, that they would have to move out of the property that they were then occupying at the time fixed for closing title, February 14th or 15th, and would require immediate possession of the premises. When the parties met to close the title, it was found that Blacher and his wife were in possession, and Blacher refused to vacate the premises or to fix definitely any time when they would remove therefrom. Such is the finding of fact by the trial court, and on that finding also a judgment in favor of the plaintiff was justified.

For these reasons the judgment of the Supreme Court will be reversed and that of the District Court affirmed.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, KALISCH, BLACK, WHITE, TERHUNE, HEPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

THOMAS REANEY, RESPONDENT, v. CENTRAL RAILROAD
COMPANY OF NEW JERSEY, APPELLANT.

Argued November 24, 1915—Decided June 19, 1916.

A landowner who invites others to use a private way owned by him as though it were a public street, and under the belief that it is such, owes to them as such owner no greater duty than that owed by the public to one using a highway.

On error to the Supreme Court.

For the appellant, *Charles E. Miller* (*George Holmes* on the brief).

For the respondent, *Warren Dixon*.

The opinion of the court was delivered by

PARKER, J. The accident that resulted in this suit occurred on the same strip of land that was involved in the case of *Black v. Central Railroad Co.*, 85 N. J. L. 197. That was a case of a railroad crossing accident, and the plaintiff in that case claimed that the strip of land in use as a way with the ordinary *indicia* of a public street was, in fact, such by dedication and public user. We there held that it was unnecessary to decide the question whether it was in fact and law a public highway, for, assuming that it was not, still, by holding it out as such, the defendant railroad company was laid under the same duty of giving statutory signals or protection by a flagman or gates as if it were in fact a highway.

The plaintiff's claim in the case at bar is quite different, and, as will be seen, must depend on the theory that the strip in question, called "Johnston Avenue," is not a highway, but private property which plaintiff was, as claimed, invited to use as a private way, and with respect to which defendant owed plaintiff the duty of care co-extensive with the invitation, as held in a long line of cases, of which *Phillips v. Library Company*, 55 N. J. L. 307, is the leading one. Plaintiff, on foot, was using this passageway early on a winter morning when it was dark and the way, as he claimed, unlighted, and the stone pavement was deep in soft mud, so that he was not seen by the men in a coal wagon that came up rapidly behind him, and did not hear it on account of the muffling of the noise by the mud and earth, so that it ran into and injured him. This was the gravamen of the plaintiff's complaint. He charged therein that the strip of land was a "street or highway" owned, controlled and maintained by defendant. The answer denied that it was a street and asserted that it was a private passageway. If it was a public highway the defendant would have no legal control over it, and, of course, would be under no obligation to light it or keep it in condition. Consequently, in order to raise any duty in favor of the plaintiff, assuming the fact of invitation, which, we think, was properly for the jury, the case must be treated on the theory of invitation to use as a passageway for pedestrians

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a strip of land belonging to and controlled by the defendant, and adapted for that purpose. On this branch of the case the theory most favorable to the plaintiff on the evidence was that the passageway was held out as a public street or lane, apparently with no sidewalk, paved with large stones, the pavement in poor order, the way used to plaintiff's knowledge continually by heavy coal trucks and express wagons, and thrown open to the public as if it were in fact a public street. Such invitation to use it as was inferable from plaintiff's employment by an express company which occupied part of defendant's premises and to whose place of business his employment called him (and no specific or express invitation anywhere appears); amounted to no more than the privilege of using the way as a dark lane or alley, in common with vehicles, horses, &c., and subject to the usual vicissitudes of miscellaneous travel. There was nothing to show the assumption of any obligation on defendant's part to light or police the way or maintain a protected footway thereon, or regulate the manner in which wagons should be driven through it. We held, in the Black case, *ubi supra*, that defendant might be held liable on the theory of negligence in an accident at a highway crossing, because the duty of giving signals or protecting the crossing was involved in holding out the way as a highway. The defendant cannot, in such a situation, be held to any greater duty, *i. e.*, it should not be said that by inviting the plaintiff to use this way as a public highway it laid itself under the duty of such care as would be called for on portions of its premises ostensibly as well as in fact controlled by it and reserved for private passageways. Its only duty was to maintain the passageway in reasonably safe condition as to roadway for the use of passengers, animals and vehicles; and we find nothing in the evidence indicating a breach of that duty. There was no duty to light; that did not rest on the municipality at common law, and if it could be said that defendant assumed the charter duties of Jersey City with respect to this way, still it does not appear that that city is required by charter to light the streets and alleys of the city. Neither was there any duty to keep the pavement clean so as

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to enable wagons to be heard. Such a doctrine would be fanciful. The failure to provide a sidewalk, and the permitting of horses to gallop in the darkness, are urged before us. They are not counted on in the complaint, and so defendant was not required to meet them; and it would have been error to permit the jury to consider them. *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441. It was therefore error to deny the motions to nonsuit and to direct, grounded in part on the absence of any duty to plaintiff that would, support the complaint.

The judgment will be reversed in order that a *venire de novo* issue.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 15.

THE STATE. DEFENDANT IN ERROR, v. MICHAEL RUBERTONE, PLAINTIFF IN ERROR.

Submitted March 27, 1916—Decided June 19, 1916.

1. The "grounds for reversal" required by section 136 of the Criminal Procedure act must point out the specific action complained of as erroneous or injurious.
2. In a prosecution for statutory carnal abuse, evidence of specific acts of sexual intercourse by the female with other men is incompetent unless the state tenders the issue that a child was born of an act of intercourse charged against the defendant, in which case defendant is entitled to meet that issue by evidence of intercourse with other men at a time when such child might have been conceived.

On error to the Supreme Court.

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For the plaintiff in error, *Howard L. Miller*.

For the state, *Charles S. Moore*, prosecutor of the pleas.

The opinion of the court was delivered by

PARKER, J. The plaintiff in error was convicted in the Atlantic Quarter Sessions of carnal abuse of a female under sixteen years of age. *Crimes act, Comp. Stat., p. 1783, § 115*. The indictment contained several counts, each charging a different date except the last, which charged divers dates between May 1st, 1912, and the finding of the indictment. There was a general verdict of guilty, and the case is brought up for review only under section 136 of the Criminal Procedure act. The Supreme Court affirmed the conviction.

The causes for reversal are for the most part general in form and therefore do not point out any specific ruling alleged as error, except as hereafter noticed. The first is that the court "admitted illegal evidence" over objection; the second, that the court "rejected legal evidence offered by the defendant;" the fourth, that the judge "ordered stricken from the record a number of questions propounded (to) and answers given by Jesse Rothrock, a witness for the defendant;" the fifth, that the judge "misdirected the jury as to the facts;" the sixth and last, that "the verdict is contrary to the law and the evidence." The statute (section 137 of the Criminal Procedure act), requires that plaintiff in error shall "specify the causes in the record relied upon for relief or reversal * * * and shall serve a copy of the causes so relied upon" on the prosecutor at least ten days before the term when the cause is to be argued. Manifestly, the service of these causes for reversal is intended, like the assignment of errors, to give notice of the precise points intended to be made, and none of the causes above quoted gives such notice. The fourth comes nearest to doing this, for it at least specifies the name of the witness; but it neither says that the court erred as to every question and answer struck out, nor does it indicate which of several such rulings the plaintiff in error intends to attack.

It happens, however, that the same point is raised in effect by cause No. 3, which is that the court refused to allow defendant to offer testimony showing the relations of the complaining witness with other men during the month of September, 1913 (*sic*—1912). The testimony of Rothrock that was stricken out bore on this point. Counsel made an offer to prove sexual relations with other men than defendant, which offer was overruled at the time.

The pertinency of the evidence offered appears from the fact that complaining witness was delivered of a child on June 11th, 1913, of which she claimed the defendant was the father, and that she had testified to intercourse between them in the preceding September, which was one of the dates charged in the indictment. When the offence charged is rape at the common law, where absence of consent is an essential element, the general bad character of the woman for chastity is admissible on the question of consent. *O'Blenis v. State*, 47 N. J. L. 279; 38 Cyc. 1478; *Rosc. Cr. Ev.* 808; 2 Bish. N. Cr. Pro., § 965; but evidence of specific instances of unchastity with other men is ordinarily inadmissible. *Id.*, § 966 (2); 33 Cyc. 1479. In a prosecution for carnal abuse under the statute, the element of non-consent is eliminated, so that evidence of sexual intercourse with other men is ordinarily incompetent as introducing an irrelevant issue. But where the state makes the issue by evidence that there was carnal abuse on or about a specific date, and in corroboration undertakes to show, as in this case, that the female was delivered of a child at the end of the normal period of gestation thereafter, and that such child is defendant's child, the defendant is entitled to meet this issue, which if found against him would demonstrate his guilt of the crime alleged, by evidence of intercourse by the female with other men at such a time as would have resulted in the conception of the child attributed to him. *Wig. Ev.*, § 133.

It was therefore error to overrule the attempt to prove that another man had had sexual intercourse with the girl early in September, 1912. This error was cured, however, by the trial judge afterwards reversing the ruling and allow-

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ing defendant's counsel to go fully into the matter by the testimony of the same witness. Consequently no legal injury was done to the defendant in this regard.

This is the only error argued and the only one properly specified. The claim that the court's charge did not go fully into the matter just considered is futile in the absence of any request to charge.

The judgment will be affirmed.

For affirmance—THE CHANCELLOR, SWAYZE, TRENCHARD, PARKER, BERGEN, KALISCH, BLACK, WHITE, TERHUNE, HEPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

**CRAMP & COMPANY, RESPONDENTS, v. EDWARD DOUGHTY
AND JOHN F. NOTLEY, TRADING AS DOUGHTY & NOT-
LEY, ET AL., APPELLANTS.**

Argued March 9, 1916—Decided June 19, 1916.

1. The plaintiff and defendants entered into a contract in which defendants agreed to excavate sufficient sand for the building of the foundation of a large hotel at an agreed price per cubic foot. After removing several thousand yards of sand the defendants abandoned the work, and in an action against them for breach of their contract defended upon the ground that as plaintiff required, and they had performed, work in addition to that called for by the contract without plaintiffs producing a written order as required by the contract, if any alteration was made in the work, the plaintiff had thereby abrogated the contract and justified their refusal to further perform. It appeared that the additional sand excavated amounted to only twenty-eight cubic yards. *Held*, that such additional work was not an alteration within the meaning of the contract and that the absence of the order was not, in such case, a good defence.
2. Under our Practice act plaintiff may join in one action a claim for breach of a contract with one for breach of the condition of a bond, given by defendants with surety, in guaranty of performance of the contract.

3. The penalty named in a surety bond is the extent of the obligors' liability in an action on such bond, but the giving of a bond to indemnify a party against loss arising from non-performance of a contract, does not, in an action on the contract for its non-performance, limit the recovery in that action to the penalty of the bond. The bond indemnifies to the extent of its penalty but is no limitation of the amount to be recovered in a separate action for breach of the original contract.

On appeal from the Supreme Court, Cumberland County Circuit.

For the appellants, *David R. Rose* and *Robert H. McCarter*.

For the respondents, *Walter H. Bacon*.

The opinion of the court was delivered by

BERGEN, J. The plaintiff having contracted with the owner for the erection of the Hotel Traymore, at Atlantic City, sublet the necessary excavation for foundations and cellar to the defendants, the terms and conditions being committed to a writing signed by both parties bearing date August 4th, 1914, in which defendants agreed to do all the required excavation of every kind, back-filling, shoring, sheet piling and pumping of water, in accordance with the specifications contained in the principal contract between the plaintiff and the owner, the work to be done under the direction of the architects whose construction of the meaning of plans and specifications should be final. It was also agreed that no alterations should "be made in the work except upon written order of the contractor; the amount to be paid by the contractor, or allowed by the subcontractor by virtue of such alterations, to be stated in said order," and if the price could not be agreed upon by the parties, the work should go on and the amount be determined by arbitration. The compensation was to be forty cents per cubic yard, the material to be excavated was, principally, ocean beach sand; water was reached when the excavation was brought to, approximately the level of the ocean, and the extent of the excavation shown by the plans.

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The contract provided for a bond of \$3,000 to guarantee the performance of the contract, which was given by defendants with "Globe Indemnity Company" as surety. On October 17th, 1914, the defendants gave plaintiff this notice, "We find that we are unable to complete the excavation work at the Traymore Hotel for which we have a contract with you, and hereby give you notice of the same." A copy of this was sent to the surety company, and it notified plaintiff that it did not elect to complete the contract. Thereafter plaintiff finished the excavation, according to defendants' contract, at an excess cost of \$19,212.44 and brought this suit, declaring against the subcontractors for the excess cost, crediting on it the penalty of the bond, and against them and the surety on the bond. The judgment is against the subcontractors for the amount found by the trial court, a jury being waived, to be due for excess cost, less the penalty of the bond, and against them and the surety for the penalty of the bond, from which the two subcontractors appeal. The surety company does not appeal.

The principal defence set up by the appellants is that they were directed to excavate to a greater depth than the plans called for, and owing to the peculiar character of the work, which required the exclusion of water, the increased depth enhanced the proportionate cost so that forty cents per cubic yard was not a fair compensation for the increased depth, and that such work was not within the contemplation of the parties, nor provided for by the contract without a written order from the contractor, and therefore they were justified in abandoning its performance, and also that the right of recovery is limited to the penalty of the bond. Whether it was proper practice to credit the amount of the indemnity, secured by the bond, against the total excess cost, rather than enter judgment for full amount of such cost leaving the judgment on the bond as indemnity, we are not required to determine as the form of the judgment is not questioned in that respect.

The appellants' objections will be considered in the order stated in their brief, the first of which is, the refusal of the

trial court to find, as requested, as a matter of law, that "to entitle plaintiff to recover from defendants, Doughty & Notley, it must produce a written order signed by the architects, and acceded to by Doughty & Notley, stating the amount to be allowed or to be deducted for alterations in the work, or prove a waiver of such order, or prove that defendants fraudulently lured plaintiff into making such alterations." There was a second request similar in form, except that plaintiff must produce an order of the principal contractor, instead of one of the architects. It is admitted that no such order was produced and the argument is, that in not producing such order the plaintiff abrogated the contract and defendants are therefore relieved from performance. If this argument has any merit, its application depends upon there being alterations in the work which required such an order, within the meaning of the contract.

The defendants excavated several thousand yards of sand before they abandoned the contract, and the trial court found that the actual excess excavation performed over that called for by the plans, was twenty-eight cubic yards. There is evidence to justify this finding and as we are not dealing with the weight of the evidence, we must assume that the net result of additional work done was but twenty-eight cubic yards, an amount we think too insignificant to call an alteration requiring a written order. In addition to this if defendants were entitled to such an order for alterations, and none was given, that did not justify their refusal to do the work contracted for, that they were bound to do even if they had the right to refuse additional work without a written order. What they did was to abandon the work altogether, and refuse performance of the residue of the work required by their contract. The form of the requests indicate that they were based upon an excerpt from the opinion in *Sheyer v. Pinkerton*, 59 *Atl. Rep.* 462, cited in *Landstra v. Bunn*, 81 *N. J. L.* 680, not applicable to this case. In those cases the suit was for work claimed to have been done in excess of the contract which required a written order, and contained a condition that no

work would be recognized as beyond the contract unless done in pursuance of a written order.

We held in *Landstra v. Bunn* that the mere performance of extra service without such written authority did not give rise to an implied waiver of the provisions of the contract. But no such question arises in the present case. If the additional work was an alteration and work not provided for in the contract, the subcontractors could, if they were right, have refused to do the work without an order, but the request to perform without it, would not abrogate the contract, nor relieve the contractor from the performance of what was not an alteration. There was no reason why appellants could not go to the depth called for by the plans and refuse to go further without the order.

The next point is, that there was no evidence to justify the finding that such additional work was not burdensome. There was testimony that it was not, and we cannot consider its weight on this appeal.

The last point argued is, that the defendants having furnished a bond for \$3,000 their entire liability is limited to that amount, and a number of cases are cited holding that in a suit on a bond the penalty is the extent to which the judgment may go. *Camden v. Ward*, 67 N. J. L. 558, and cases there referred to. The rule in that and kindred cases does not conflict with this judgment, for the judgment on the bond is limited to the penalty, and under our present Practice act a plaintiff may join separate causes of action against several defendants if the causes of action have a common question of law or fact, and arise out of the same transaction. *Pamph. L.* 1912, p. 377, § 6.

In the present case the plaintiff had two causes of action arising out of the same transaction, one for damages for a breach of a contract, and another on the bond given in guaranty of its performance. The breach of the contract by the defendants was a question common to both cases—they arose out of the same transaction. There can be no doubt of the right of the plaintiff to proceed against defendants for a breach of their contract, and also to enforce its indemnity

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under the condition of the bond in a separate action, and if so, plaintiff has the right, under the statute, to join the two causes in one action.

No error appearing in this record, the judgment should be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, TAYLOR, GARDNER, JJ. 14.

For reversal—None.

THE TOWNSHIP OF DENVILLE, APPELLANT, v. ST. FRANCIS SANITARIUM, RESPONDENTS.

Submitted March 21, 1916—Decided June 19, 1916.

1. By the provisions of the amendment of the general act concerning taxes (*Pamph. L. 1913, p. 570*), all buildings used for charitable, benevolent or religious purposes, not conducted for profit, and the land whereon they are situated necessary for the fair enjoyment thereof, not exceeding five acres, are exempt from taxation although owned by a corporation of a sister state.
 2. According to the terms of the same amendment, a charitable, benevolent or religious work is not conducted for profit where it is partly supported by fees and charges received from beneficiaries, provided the building is wholly controlled and the entire income therefrom is used for said charitable, benevolent and religious purposes.
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On appeal from the Supreme Court.

For the appellant, *John F. Stickle* and *Elmer King*.

For the respondents, *Thomas J. Hillery* and *Edward K. Mills*.

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The opinion of the court was delivered by

BERGEN, J. The Sisters of the Sorrowful Mother, a corporation of the State of Wisconsin, is the owner of two hundred and three acres of land, in the township of Denville, in the county of Morris, in this state, on which have been erected a parsonage, convent, several other buildings used for sanitarium purposes, a church in process of construction and necessary farm buildings. A small part of the land was set apart for burial purposes. The assessor of taxes for the township of Denville assessed the entire property, refusing any exemption, which action is the basis of this litigation. The assessment is against "St. Francis Sanitarium," a name by which the institution is locally known, instead of against the Sisters of the Sorrowful Mother, the corporate name of the owner, but this is not of any consequence, for such an error will not defeat the tax under section 30 of "An act for the assessment and collection of taxes" (*Comp. Stat.*, p. 5109), and no objection is raised to the assessment for that reason. The owner appealed from the action of the township assessor to the Morris county board of taxation which reduced the assessment, and thereupon the township appealed to the board of equalization of taxes of New Jersey, and that board exempted from taxation the church, parsonage, cemetery and the buildings used as sanitariums, with five acres of land necessary for the fair enjoyment of the exempted buildings, and determined that the residue of the land and buildings, as well as certain personal property, were subject to taxation, and after ascertaining and fixing the ratable value thereof made an order in accordance with such determination and valuation.

A writ of *certiorari* was allowed the township to review this order, and the Supreme Court, agreeing with the state board in its findings of fact, affirmed the order, and from that judgment the prosecutor of the writ has appealed to this court. The taxable valuations fixed by the board and affirmed by the judgment of the Supreme Court are not assailed on this appeal, which is rested upon the single ground that none

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of the property should be exempted, for reasons now to be considered in the order submitted on prosecutor's brief.

The first is, that the profits derived from the use of the exempted buildings and land are not applied to charitable uses. This proposition takes no notice of the words "benevolent or religious." Subdivision 4 of paragraph 3 of the Tax act, *Pamph. L.* 1913, p. 570. By this amendment buildings, and a limited quantity of land, are exempted where they are used for charitable, benevolent or religious work, even when supported partly by fees and charges received from the beneficiaries, provided the entire income therefrom is used "for said charitable, benevolent or religious purposes," thereby extending the exempted class.

The state board of equalization of taxes, as well as the Supreme Court, found as a fact that the entire income of the institution is being used to carry on its work either in this state or other states where it maintains branches, and that the work is charitable under the common law, and there being evidence to support this finding, it will not be reviewed by this court on appeal. *Sisters of Charity v. Cory*, 73 N. J. L. 699.

The apprehended unfortunate results flowing from construing the law as written, to which a portion of prosecutor's brief is devoted, should, if well founded, be addressed to the law-making branch of the government which alone has the power to grant or regulate exemptions from taxation.

It is next urged that the judgment should be reversed because the property is owned by a foreign corporation, the contention being that the property "must be owned by a corporation of this state." That this claim is not sound will appear by an examination of our legislation relating to exemptions from taxation. The act of 1894 (*Rev. Stat.*, p. 3320) exempted the buildings of certain institutions of learning and buildings used for religious worship, asylums and other designated purposes, provided they were incorporated under the laws of this state, and also the land on which they were situated, necessary to their fair use and enjoyment, not

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exceeding five acres, as well as all buildings exclusively used for charitable purposes and sufficient land for the fair enjoyment thereof.

In construing this statute, the Supreme Court held many years ago that buildings, and an appropriate quantity of land, not exceeding five acres, used exclusively for charitable purposes, was exempt, although owned by a corporation of a sister state. *Litz v. Johnston*, 65 N. J. L. 169; *Congregation of St. Vincent de Paul v. Brakeley*, 67 Id. 176; *Bancroft v. Magill*, 69 Id. 589. It is here urged that these cases are not applicable because the legislature in 1903 (*Comp. Stat.*, p. 5079) revised the act relating to exemptions, and amended the Revision in 1913. *Pamph. L.*, p. 570. This additional legislation, however, continued in the exempted class "all buildings used exclusively for purposes considered charitable under the common law," without limitation as to ownership, and if the property is used exclusively for charitable purposes, the cases cited are applicable to the amended statute. That the respondent's property, exempted by the judgment of the Supreme Court, is used exclusively for purposes considered charitable under the common law, was found as a fact by that court, and the finding is supported by the evidence. But if there could be any doubt about the correctness of the rule laid down in the cases cited, which we do not intend to intimate, the statute of 1913, which governs this case, has removed it. By that statute the institutions entitled to exemption are divided into classes, which was not the case in the statute of 1894. The first class includes buildings used by colleges and other institutions of learning, or for the moral and mental improvement of men or women, "or for religious, charitable, benevolent or hospital purposes, or for one or more of such purposes not conducted for profit."

The second class is buildings used "for public libraries, religious worship, or for asylums or schools for feeble-minded or idiotic persons and children, and owned by corporations of this state authorized to carry on such charities," to which the limitation "not conducted for profit" does not apply.

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The next exemption is the land whereon the buildings are situated necessary for their fair use; "not exceeding five acres for each." The act distinguishes buildings and land of institutions not conducted for profit from those which are the ownership by a corporation of this state being required as to property in the second class, but not to that in the first. That the buildings and land exempted in this case are used for charitable, benevolent and hospital purposes abundantly appears, and as the act extends the exemption to cases where the charitable and benevolent work carried on is supported partly by fees and charges paid by the beneficiaries where the entire income is used for such purposes, the fact appearing in this case that there is an income from the beneficiaries which is used for charitable and benevolent purposes, does not make this institution one conducted for profit, and thus beyond the benefit of the exemption.

The testimony concerning the use of the income shows that the entire net income is used in part payment of the cost of the property and buildings, and for the erection of a church on the land, which are used for charitable, benevolent and religious purposes, and are therefore within the scope of the act. We are dealing with the facts as they appear in this record, and are not to be understood as deciding that the application of the entire income to any purpose which the institution might claim to be benevolences or charities would, in all cases, give the institution the right to the exemptions allowed by the statute. Whether the application of the entire income is within the scope of the act must depend upon the conditions existing in each case.

The judgment of the Supreme Court will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ.
13.

For reversal—None.

First Nat. Bank of Roselle v. Dorvall.

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FIRST NATIONAL BANK OF ROSELLE, PLAINTIFF-RESPONDENT, v. JOHN F. DORVALL, DEFENDANT-APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

1. Where one makes a promissory note payable to his own order for the accommodation of another, and endorses it to the person for whose accommodation it was made, the maker may, in an action by such accommodation holder, set up a failure of consideration.
2. If, in an action on a promissory note against the maker, there is evidence to show that the note was made for the accommodation of one not a party to the note, the proceeds, however, to be used to redeem his property, and not for the accommodation of the holder who advances the money, a finding by the trial court in accordance with such testimony will not be reversed on appeal because there is contrary evidence tending to show that the note was made and delivered for the accommodation of the holder, for the weight of the testimony is not subject to review on appeal.

On appeal from the Supreme Court.

For the respondent, *Nathan R. Leavitt*.

For the appellant, *David S. Feinswog*.

The opinion of the court was delivered by

BERGEN, J. The plaintiff brought his action in the District Court of the city of Elizabeth to recover the principal and interest of a promissory note made by the defendant to his own order for \$450 and interest, payable at the banking house of the plaintiff. The defendant endorsed the note which was delivered to the plaintiff. The consideration for this note was a check drawn by the cashier of the plaintiff against the funds of the plaintiff to the order of the defendant, which the latter endorsed to the sheriff of the county of Union on account of a bid for the property of one L. A. Deitz at a

foreclosure sale thereof. The sale was not consummated and the sheriff was required to again offer it for sale, and on the re-sale the property did not realize enough to pay the indebtedness, and the \$150 paid at the first sale was forfeited.

The defence set up at the trial was, that the cashier of the plaintiff, acting on its behalf, induced the defendant to sign the note as an accommodation for the bank upon a promise that defendant would never be asked to pay it; that the cashier represented to defendant that the bank desired to buy the property of Deitz in order to save it from loss on obligations of Deitz held by it, and as the bank did not wish to take the title in its name, the defendant was requested to act for the bank and hold the title for it, and that the note was given as a mere memorandum of the amount which the bank had advanced towards the bid, and that defendant was to hold the property until the bank could dispose of it, or until the note was paid. There was evidence tending to show that the making of the note and its endorsement to the bank was for the accommodation of Deitz and not for the bank. The District Court determined that the note was made for the accommodation of Deitz and not, as the defendant claims, for the bank. There is evidence to sustain this finding and therefore the defence set up by the defendant, if available, depended upon a question of fact, and the trial court having found adversely to the defendant on the controverted question, this court will not review the conclusion of the trial court on the question of fact where there is some evidence to sustain it.

The Supreme Court on appeal from the District Court affirmed the judgment. This result, we are of opinion, is justified by the record, but we do not approve the reason upon which the Supreme Court rested its judgment, which was, "that the rights and obligations of the endorser of a negotiable promissory note cannot be varied by parol testimony of his oral agreement made before or at the time of his endorsing the note." We do not question the legal rule stated, but it is not applicable to the facts in this case where the defendant is the maker of the note, and his defence is want of con-

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sideration. If it be true that the bank, assuming that the cashier had authority to bind it, induced the plaintiff to give the note as an accommodation for it, and the cashier's check was used to pay the indebtedness of the bank on account of a bid for the property which in fact it was purchasing in the name of the defendant, no consideration passed from the bank to the maker of the note, and if these facts were undisputed, the plaintiff could not recover on the note. The Supreme Court relied upon *Foley v. Emerald Brewing Co.*, 61 N. J. L. 428. In that case the endorser defended upon the ground that plaintiff, the holder of the note, had agreed with the endorser that he would accept a partial payment weekly from the maker until the note was paid, and it was there held that proof of the extension of the time for payment, contrary to the tenor of the note, was not admissible, but this is not applicable to a case between the maker and the holder where the note is made for the accommodation of the holder.

The judgment will be affirmed upon the ground that there was evidence supporting the finding that the note was made for the accommodation of Deitz, a friend of the maker, who had been at that time adjudged a bankrupt, and was trying to save his property.

The judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

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Van Houten v. Van Houten.

CHARLES VAN HOUTEN, PLAINTIFF-RESPONDENT, v.
ADMUND VAN HOUTEN, EXECUTOR, DEFENDANT-
APPELLANT.

Argued March 13, 1916—Decided June 19, 1916.

1. Where a case has been fully tried including issues not perfectly pleaded and the complaining party has not been surprised, or suffered any injury, this court has the power to amend the pleadings to conform to the proof and should, in such case, in the interest of justice, exercise the power.
2. In an action by a grandson to recover from the estate of his grandfather on an oral contract by which the grandfather agreed to leave a legacy to the grandson in consideration of services to be rendered, it is not error to permit proof of the relationship, for it bears on the probability of the making of such a contract, because a grandfather would, ordinarily, be more likely to contract to give a legacy to one of his blood than to a stranger. The inferences to be drawn from such circumstance is for the jury to settle.

On appeal from the Passaic Circuit Court.

For the appellant, *John B. Humphreys* and *C. Frank Kireker*.

For the respondent, *Ward & McGinnis*.

The opinion of the court was delivered by

BERGEN, J. The plaintiff recovered a judgment for \$10,000 based upon an alleged contract that he would give up a project which he had of leaving the employment of the deceased, his grandfather, and going west to live. The grandfather in order to induce him to remain with him agreed, if he would do so, to leave him by will \$10,000, and not having kept his agreement, plaintiff brought suit against his estate on the contract. The appellant, the defendant below, argues but three points, first, that the complaint is insufficient to support the action, and that judgment for that reason should have been for the defendant. The point made is, that the

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complaint does not state whether the plaintiff was not to go west at that time to live, or not at any time during the grandfather's life, and second, that it does not state for how long a period he was to remain, and third, that the alleged consideration was not sufficient. The criticism that the length of time the plaintiff was to remain with his grandfather was not stated in the complaint seems to be justified, but the proof brought out by the defendant on cross-examination of plaintiff's witness shows that the agreement was that the plaintiff was to stay until the grandfather died, the testimony being, "If you stay here by me until I die, why you will get \$10,000." The case was tried upon the theory that this was the contract and we think the complaint should be considered amended to cover the real issue tried, and that the motion to nonsuit upon this ground was properly refused. *Redstrake v. Cumberland Insurance Co.*, 44 N. J. L. 294. The power of amendment extends to this court, and where the issue has been fairly tried and no injury has been done to the party complaining, it is incumbent on this court in the interest of justice to exercise the power. *American Life Insurance Co. v. Day*, 39 *Id.* 89.

The brief of the appellant states that his chief reliance is upon "the uncertainty of the contract, or, rather, the uncertainty of the consideration of the contract," and argues, that the words "until he died," referred to the plaintiff, but this is not so because the very next question asked on cross-examination was, "Q. Until Charles died? A. No; until grandpop died." The effect of this testimony was for the jury and if they believed the witness, then the contract was that the plaintiff should stay with his grandfather until he, the grandfather, died.

It is also argued that as Charles and his brother each have similar actions, they should have been joined, and thus both witnesses disqualified, the action being against an executor of a will. But there is nothing in this, for the statute does not require that two plaintiffs must join, in a single suit, separate causes of action.

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The next point is, that the court erroneously admitted testimony showing that a relationship of natural affection existed between the parties. We do not think this was error because by the very nature of the contract its making would be more probable if such a relationship existed, for if the plaintiff was of the blood of the contractor, he would be much more likely to make such a contract with him than he would with a stranger. These are the only points argued, and as to them we think there was no error, and therefore the judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 15.

For reversal—None.

SARAH C. DORSETT, RESPONDENT, v. SAMUEL P. VOUGHT,
APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

1. Where a testator devised certain lands for life to his wife, and made no disposition of the remainder, the undisposed of estate descended to his heirs-at-law, in this case four first cousins, to the exclusion of one referred to in another connection in the will as the testator's adopted daughter.
2. The fact that the testator took into his family a girl of tender years, but never formally adopted her according to law, but referred to her in his will as his adopted daughter, will not accord to her the *status* of an adopted child, so as to clothe her with the legal right of inheritance, in the absence of proof that she was legally adopted.

On appeal from the Supreme Court.

Dorsett v. Vought.89 N. J. L.

For the respondent, *J. W. & E. A. De Yoe*.

For the appellant, *George S. Hilton*.

The opinion of the court was delivered by.

MINTURN, J. The plaintiff sued in ejectment, to recover an undivided fourth interest in certain lands, adjoining the city of Paterson, known as Pope's Hall and Smith's Quarry, the property in his lifetime of Samuel Pope, and of which he died seized.

The testator had taken into his family, quite early in her youth, Ida Vought, the mother of the defendant. She afterwards married and had two children, of whom this defendant is the survivor. The testator's nearest blood relations were four first cousins, of whom one is the plaintiff.

The will of the testator was duly probated, and therein he devised to his wife a life estate in the *locus in quo*, and left the residuary estate undisposed of. In the will he refers in another connection to the defendant and his deceased sister as "the two minor children of my adopted daughter, Ida Vought, now deceased."

Upon the strength of this testamentary description of his mother, the defendant claimed the undisposed of residuary estate of the testator; while the plaintiff advances her claim to a fourth interest therein upon the theory that she is one of the four surviving first cousins of the testator, who constitute his only heirs-at-law.

The rule is fundamental that unless the intent of the testator to disinherit them be clear and palpable, the heirs-at-law will not be disinherited. *Birdsall v. Applegate*, 20 N. J. L. 244; *Graydon v. Graydon*, 25 N. J. Eq. 561; *Woodruff v. White*, 78 *Id.* 410, affirmed by this court in 79 *Id.* 225; *Areson v. Areson*, 3 *Den.* 458.

There is no contention made that Ida Vought was formally and legally adopted by the testator as his daughter, and this being so, the allusion to her by the testator as his adopted daughter cannot be held to confer upon her a legal *status*, which the law recognizes only after the adoption to that end,

in solemn form of certain prescribed statutory requisites. *Comp. Stat.*, p. 2807; *Pamph. L.* 1902, p. 259.

The cases cited in the respondent's brief are sufficiently luminous in support of this proposition, and indicate the rule to be that under such circumstances, the words used by the testator are merely *descriptio personarum*, and do not *per se* effectuate the transformation of the legal *status* of a stranger to the blood to that of a child in law, with the incidental rights of blood relationship. *In re Hughes Estate*, 225 Pa. St. 79; 73 Atl. Rep. 1061; *In re Lines Estate*, 221 Pa. St. 374; 70 Atl. Rep. 791; *In re Carroll Estate*, 219 Pa. St. 440; *Smith v. Allen*, 161 N. Y. 478; *Ferguson v. Jones (Oregon)*, 3 L. R. A. 620; 1 Cyc. 932, and cases cited.

As a logical sequence of this cardinal doctrine, it has been determined that "no one who by law is entitled to the property as heir can be shut out from his inheritance by any act of the ancestor, unless such act amounts to a disposition of the property by will." *Tied. Real Prop.* 665, and cases cited.

The effect of these adjudications is to determine that the right of a child by adoption to inherit is entirely of statutory creation; that the right being in derogation of the common law must be strictly construed, and will be denied unless the act of adoption shall have been consummated in strict accordance with the statute.

The determination of this question makes it unnecessary to construe the will further than to settle the narrow inquiry presented in this issue, and from the conclusion we have reached upon the question of defendant's legal *status*, it is apparent that the defendant has not been constituted a legal heir by the language of the testator, and that the testator's sole surviving heirs-at-law at the time of his death were Sarah C. Dorsett, Mary E. Goble, Jeremiah Van Iderstine and Harvey Boyea.

The plaintiff's right to inherit, it must be apparent, receives its support not from the testamentary action or lapsus of the deceased, but from the fact that she possesses to the exclusion of the defendant the qualifications established by law, as one of the testator's sole surviving heirs-at-law.

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We observe no force in the remaining contentions of the appellant, and conclude that the judgment appealed from should be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 16.

For reversal—None.

ABRAM J. DRAKE, RESPONDENT, v. MILLER N. MOWDER,
APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

Where a summons in a District Court was endorsed with plaintiff's demand, and the state of demand was then filed, and notice of such filing served upon defendant—*Held*, that the trial court, in the absence of defendant, and without his knowledge or consent, could not order judgment entered for a sum greater than that contained in the process and state of demand.

On appeal from the Supreme Court.

For the respondent, *King & Vogt*.

For the appellant, *Elmer W. Romine*.

The opinion of the court was delivered by

MINTURN, J. The plaintiff herein sued the defendant, in the First Judicial District Court of Morris county, for the sum of \$331.08, as appears by the summons in the action, and without further notice caused judgment to be entered against him for the sum of \$415.54, with costs.

The state of demand filed by the plaintiff, showing in detail the items going to make up the plaintiff's cause of action, was filed with the clerk of the court when summons was issued, and notice to that effect was served upon the defendant, with the summons.

Upon the return day the defendant failed to appear, and the court ordered the state of demand to be amended, and gave judgment for the increased amount. This procedure we deem to be erroneous.

While we do not deny the court's power in matters of form to order an amendment, we conceive it to be manifest that a change in the *quantum* of the claim by which a defendant, without his presence, knowledge or consent is subjected to a judgment for an amount in excess of that stated in the process and pleadings, is not such an informality which the statute concerning amendments contemplates, but rather savors of the substance and gravamen of the complaint. *Non constat* that the defendant, in view of the information conveyed to him by the process, and for reasons satisfactory to himself, may have concluded to allow judgment to go against him for the claim, viewing it not as an incorrect demand, and, therefore, intentionally absented himself from the court.

If, however, the legal *status* which he is thus permitted to assume, be subject without his knowledge or consent to be changed to his detriment, a situation is presented which admits of an enforced liability upon an absent defendant, the extent of which can be determined only by the limitation of the court's jurisdiction. *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441, 444.

The cases of *Cortelyou v. Cortelyou*, 2 N. J. L. *318, and *Excelsior Electric Co. v. Sweet*, *supra*, are sufficiently critical of such procedure as to warrant their citation as authorities adverse to it.

The result is that the judgment must be reversed and the record remitted to the Supreme Court, to the end that at the plaintiff's option the judgment may be reduced to the amount of the original demand.

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For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

SAMUEL RABINOWITZ, RESPONDENT, v. BAYARD HAWTHORNE, APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

1. Plaintiff while in the act of crossing a street intersection with his horse and wagon was struck by an automobile driven by defendant. *Held*, under conflicting accounts of the circumstances attending the accident, the question of negligence of the defendant and the contributory negligence of the plaintiff were for the jury.
2. The plaintiff's testimony showed in detail, from memory, his daily and weekly receipts and profits from his business as a huckster, upon which data he based an estimate of his loss. *Held*, admissible; the credibility of the witness and the value of his estimate under the circumstances being for the jury to determine.

On appeal from the Supreme Court.

For the respondent, *William Newcorn*.

For the appellant, *M. Casewell Heine*.

The opinion of the court was delivered by

MINTURN, J. The suit was brought to recover for personal injuries, suffered by the plaintiff, by the negligence of the defendant, in the city of Plainfield. The plaintiff, while plying his trade as a huckster, drove his horse and wagon slowly in a westerly direction, along East Second street, and while crossing Watchung avenue he was run into by defendant's automobile, traveling rapidly in a northerly direction.

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The plaintiff's wagon was struck in the rear and badly damaged, and the plaintiff was injured, for which injuries the jury rendered a verdict for the plaintiff. It is urged on this appeal, that the trial court should have ordered a nonsuit, or directed a verdict for the defendant. We think its course in declining to accede to either request was correct.

The case presented essentially a question of fact, upon testimony more or less conflicting, and therefore resolved itself into a jury question. It was deducible from the testimony that the plaintiff had reached the crossing first, and was therefore in a position legally to expect that he would be accorded the right of way. *Miller v. Electric Railway Co.*, 59 N. J. L. 423; *Kathmeyer v. Mehl*, 60 Atl. Rep. 40.

Whether under the circumstances the defendant in approaching and passing over the crossing, exercised due care in the control of his machine, for the safety of others lawfully upon the street, became a jury question. *Reeves v. Consolidated Traction Co.*, 58 N. J. L. 573.

Whether the plaintiff, in observing the approach of the automobile, exercised due care in the conduct of his horse and wagon, so as to acquit himself of the charge of contributory negligence, in the view of conflicting testimony, was equally a jury question. *Pesin v. Jugovich*, 85 N. J. L. 256; *Keenan v. Public Service Co.*, Id. 639; *Wescoat v. Decker*, Id. 716.

The plaintiff kept no books, and was therefore allowed to testify from memory, as to his average profits, and to this exception was taken.

It may be observed, that unless this class of testimony is to be entirely excluded upon principle, there must be circumstances under which its introduction will be admissible, and instances of this character are supplied by the decisions of this court. *Bartow v. Erie Railroad*, 73 N. J. L. 12; *East Jersey Water Co. v. Bigelow*, 60 Id. 201; *Wolcott v. Mount*, 36 Id. 262, 265; *New Jersey Express Co. v. Nichols*, 33 Id. 434, 439; *Standard Am. Co. v. Champion*, 76 Id. 771.

The test seems to be, whether under the testimony such

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profits are capable of being estimated "with a reasonable degree of certainty." *Wolcott v. Mount, ubi supra*.

The plaintiff gave in detail, from memory, his method of business, and his daily earnings from which data he estimated his average weekly income. The reliability and credibility of this testimony was for the jury to consider, in their discretion, in fixing the *quantum* of damages.

The production of plaintiff's books, had he kept any, would have injected into the narrative an element of certainty, upon which a jury might estimate damages with more precision and certainty; but in the absence of books, human memory, while it may be criticised and discredited, cannot be ignored as an evidential factor, by which financial data may be furnished, to support a litigant's estimate of his loss. 1 *Greenl. Ev.* 514, and cases cited; 17 *Cyc.* 781, and cases cited.

In such a situation this character of proof is accepted, as was said by this court in *East Jersey Water Co. v. Bigelow, ubi supra*, "not on the ground of its furnishing a measure of damages, to be adopted by the jury, but to be taken into consideration by the jury, to guide them in the exercise of that discretion, which to a certain extent is always vested in the jury."

The remaining objections urged to this verdict, seeming to us inconsequential, the judgment will be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 15.

For reversal—TAYLOR, J. 1.

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**HENRY SCHNACKENBERG, RESPONDENT, v. DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COMPANY,
APPELLANT.**

Argued March 14, 1916—Decided June 19, 1916.

Where the plaintiff, on a dark and foggy morning, approached a railroad crossing with his horse and wagon, and stopped, looked and listened for an approaching train, and after due observation neither heard nor saw one approaching, and the defendant maintained gates and a gateman at the crossing, and the gates were up, and the defendant met the situation thus presented by proof that the approaching engine bell was rung and the approach of the engine was discernible from various points at the crossing—*Held*, that the issue thus presented was one of fact, and was properly submitted to the jury.

On appeal from the Essex County Circuit Court.

For the respondent, *William K. Flanagan*.

For the appellant, *Frederic B. Scott*.

The opinion of the court was delivered by

MINTURN, J. At about four-forty-five o'clock, on a dark and misty morning, on January 25th, 1913, while the plaintiff was driving his horse and bakery wagon on Harrison street, in East Orange, he attempted to cross the defendant's railroad tracks, which cross that street, and in the endeavor his horse and wagon were struck and run down by defendant's locomotive. The horse was killed, and plaintiff suffered serious injuries. Before crossing the track he stopped, looked and listened, and, hearing and observing no evidence of an approaching train, he undertook to cross the track. When the horse reached the eastbound track, the plaintiff observed the engine approaching, and heard the noise incident to its approach, but too late to save himself or his property from the peril which confronted him.

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The negligence alleged in the complaint was the failure to give the statutory signals, as well as the failure to lower the gates at the crossing. The proof disclosed that the defendant maintained gates at the crossing as well as a gateman, and that at the time the plaintiff was making his observations, as well as while he was attempting to go over the crossing, the gates were up, and the gateman quiescent in his shanty was apparently oblivious of his environment. There was nothing therefore to indicate to the plaintiff from personal observation, or from defendant's compliance with any statutory requirement to warn the plaintiff that danger was imminent, or that risk and peril encompassed his undertaking.

Furthermore, it was in evidence that besides the fog and darkness of the morning, the situation was complicated by the presence of groups of trees and the usual telegraph poles, located along the line of the track upon which the engine proceeded, so that at the time of plaintiff's observation it was not practicable to discern an object up the track further away than thirty feet. To this was added the element of implied invitation to cross, contributed by the railroad by keeping up its gates instead of lowering them. *Brown v. Erie Railroad Co.*, 87 N. J. L. 487.

This *prima facie* case manifestly precluded a motion to nonsuit, and none was urged.

The defendant introduced testimony to show that the engine bell was rung at the time, and clarified the situation by introducing a map, together with photographs of the location, and witnesses who testified from observations made in the daytime, and under different climatic conditions, as to distances observable along the track from various points of view at the crossing.

Defendant then moved for the direction of a verdict for the defendant upon the ground of the contributory negligence of the plaintiff, and the absence of any negligence upon the part of the defendant.

The facts here outlined, quite obviously, even upon the basis of the common law rule applicable to such a situation,

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presented a question of fact for the jury to decide, and the court quite properly refused to direct a verdict. *Napodensky v. West Jersey and Seashore Railroad Co.*, 85 N. J. L. 336; *McCoal v. West Jersey and Seashore Railroad Co.*, 81 Id. 479; *Shafer v. Lehigh Valley Railroad*, 75 Id. 75.

But when this common law *status* of the plaintiff's case is accentuated by the statutory element of deliction, upon the defendant's part, made apparent by the provisions of the act of 1909, page 137, entitled "An act with reference to the degree of care necessary to be used by travelers over railroad crossings protected by flagmen or safety appliances, or both," it becomes manifest that the failure of the railroad to comply with this regulative enactment, renders the application of the doctrine of contributory negligence, upon a motion to nonsuit, or to direct a verdict, of comparatively negligible importance. *Shafer v. Lehigh Valley Railroad*, *ubi supra*; *Brown v. Erie Railroad Co.*, 87 N. J. L. 487.

That act has been declared constitutional by this court. *Fernetti v. West Jersey and Seashore Railroad Co.*, 87 N. J. L. 268.

Its provisions exempted the plaintiff from the charge of contributory negligence in this situation, even if he failed to stop, look and listen before passing over the crossing; for it is not denied that the gates at the crossing were capable of being operated at the time, and that a gateman was there to operate them, but failed to do so. *Fernetti v. West Jersey and Seashore Railroad Co.*, *supra*.

Our examination of the remaining exceptions presented in defendant's brief fails to satisfy us that they are meritorious.

The judgment will therefore be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 14.

For reversal—None.

GEORGE F. POOL, PLAINTIFF-APPELLANT, v. RUFUS DONALDSON BROWN, DEFENDANT-RESPONDENT.

Submitted March 27, 1916—Decided July 5, 1916.

1. The circumstance that new elements of locomotion, such as electricity, steam, &c., have been added to vehicles using public highways has not wrought any modification in the legal principle that the driver of a vehicle has no superior legal right in the use of the highway over a pedestrian in the exercise of a lawful right to cross the highway, but that the law imposes reciprocal obligations to use reasonable care.
2. Where there was testimony that the plaintiff attempted to cross a street between two standing vehicles which obstructed his view for some distance, and that after he had reached a point where he had a view to both north and south, he looked to the north and saw a slow moving wagon about thirty or forty feet away and then looked to the south and saw nothing approaching, whereupon he took a step forward about three feet, when he was struck by defendant's automobile coming from the north, which gave no signal or warning of its approach—*Held*, that the question of the negligence of the defendant and the contributory negligence of the plaintiff was for the jury.

On appeal from the Essex Circuit.

For the appellant, *Peirce & Hoover*.

For the respondent, *M. Casewell Heine*.

The opinion of the court was delivered by

KALISCH, J. The appellant appeals from a judgment of nonsuit. His contention is that the nonsuit was improperly ordered because the facts developed by the testimony in the case presented issues which should have been submitted by the court to the decision of the jury.

The facts, briefly stated, are these: The appellant was struck and injured by respondent's automobile while he was crossing Halsey street, in Newark. Halsey street, from curb to curb, is about thirty feet in width, and runs north and south. Bleecker street, about equally as narrow as Halsey

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street, runs at right angles into Halsey street from the west, and terminates at Halsey street. On the easterly side of Halsey street stands a large department store, a part of the rear of which faces Bleecker street. The rear of the store has several entrances and exits on Halsey street. The appellant in the daytime came out of one of the rear exits of the store and started to walk north on Halsey street until he reached a point on that street which was in a direct line of the southerly sidewalk of Bleecker street, when he made preparations to cross the street. At that time, according to the appellant's testimony, there was a top wagon of the department store standing, backed up to the curb, which wagon extended into the street about twelve feet. To the south of the wagon stood an automobile, leaving ample space between the two vehicles for a crossing by persons desiring to cross the street at that point. While on the sidewalk, and before starting to cross, the appellant looked to the north and observed a team of horses pulling a team wagon, with a colored driver sitting on a high seat, driving the team slowly in the centre of the street, in a southerly direction, about fifty or sixty feet away. The appellant then started to cross through the open space referred to, his view to the north for the distance of twelve feet being shut out by the top wagon standing there, and when he reached a line of vision to the north, he again looked that way and only observed the same team of horses with the colored driver, which were then about thirty or forty feet away; he then looked to the south and saw nothing approaching and then took a step forward, about three feet, when he was struck by the respondent's automobile, which came from the north, and which the appellant says he did not see at the time he looked in that direction. There was also testimony to the effect that the driver of the automobile gave no signal or warning of any kind of the approach of the automobile.

The suggestion has been made that since it appeared that the appellant had only succeeded in taking a single step forward after he had a view to the north, when he was struck by the automobile coming from that direction, it is a legal presumption that if he had looked with any degree of care he

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could not have failed to see the automobile so close to him that the danger of attempting to cross in front of it would have been apparent to an ordinarily prudent person in the exercise of reasonable care for his own safety. We do not think that the testimony justifies such a presumption either of law or fact. But this claim will be considered later when we reach the topic of the respondent's contention that the appellant was negligent, and that his negligent conduct contributed to his injury.

At the very outset it is highly important that it should not escape observation that the situation, presented by the facts under consideration, relates to a pedestrian in the exercise of a lawful right to cross a public highway and the driver of a vehicle who had no superior legal right in the use of the street. Under such circumstances, the law imposes reciprocal obligations. Those reciprocal obligations are the offspring of elementary and familiar legal principles, which, by reason of their soundness and wisdom, have become firmly imbedded in the law. In fact, it is a strict observance of those legal principles that tends to make our public highways passable and safe to the drivers of vehicles and pedestrians alike. The circumstance that new elements of locomotion, such as electricity, steam, &c., have been added to vehicles using public highways has not wrought any modification of those legal principles.

The driver of the automobile was under a legal duty to use reasonable care to avoid colliding with other vehicles or persons in the public highway. His duty was to be on the alert, to observe persons who were in the street, or about to cross the street, and to use reasonable care to avoid colliding with them. He was under a duty to have his automobile under proper control. He was under an obligation to take notice of the conditions existing in the public street and to propel his car in a manner suitable to those conditions. He was under a duty to observe the condition which existed at the cross-walk, in that for a distance of twelve feet the view of a person crossing from the east to the west side of Halsey street was obscured by the top wagon. The uncontradicted fact in the case is that

the driver of the automobile gave no audible signal or warning of his approach to the obscured part of the cross-walk. From that fact alone the jury might properly have found that the driver's failure to sound a warning of the approach of his automobile to the crossing was negligent conduct. Furthermore, from the testimony, the jury might have found that the chauffeur was negligent in driving too close to the obscured part of the cross-walk, or that, in the exercise of reasonable care, he might have avoided the accident by steering his car to the right. At least, there was a jury question whether, in the circumstances which then existed, the chauffeur could have avoided striking the appellant if he had exercised reasonable care.

On the other hand, the law cast upon the appellant the duty to use reasonable care for his own safety. He was under a legal duty to observe the conditions in the highway. He had a right to rely on the driver of the automobile respecting his, the appellant's, equal right in the street, and that the driver would control his car accordingly, and would use reasonable care to avoid running it against the appellant. Of course, if it had appeared that the appellant rashly stepped in front of the automobile, under circumstances that would justify no difference of opinion among reasonable men as to the negligent character of such conduct, then a nonsuit would have been properly ordered. But that does not appear, from the evidence in the cause, to have been the case. The testimony shows that when the appellant looked to the north before he took the step to cross the street, the team wagon was within thirty feet of the spot where he was standing. The appellant saw no automobile, and that might very well have been so; for if the automobile was behind the team wagon, which was proceeding in the centre of the highway, or was to the right of the wagon, the automobile would have been concealed from the view of the appellant. If, while the appellant was looking toward the south to guard against any danger to be apprehended in that direction, the automobile suddenly spurted from behind the team wagon, it is not an unfair inference that the appellant, when he took the step

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forward to continue crossing the street, was suddenly overtaken by an unexpected peril.

Bearing in mind that Halsey street is only thirty feet wide; that the top wagon of the department store obstructed, within three feet of the centre of the highway, the appellant's view to the north; that the three feet of space between the extreme westerly end of the top wagon and the centre of the street was apparently insufficient to allow a vehicle to pass between the team and the top wagon when the vehicle reached that part of the street, it cannot be said, as a matter of law, that a prudent person, in the exercise of reasonable care, similarly situated as the appellant was, would not have acted as the appellant did. That was necessarily a jury question. The appellant was under no legal duty to anticipate that there was an automobile behind the team wagon, or, if there was, that the driver of the automobile would attempt to pass and head off the team wagon near or at the place where the top wagon was standing, and thus imperil the safety of pedestrians emerging from the passageway. Nor was the appellant bound to anticipate that a vehicle would approach him on the left side of the road, which was the wrong side for vehicles to be on, going south. It is inferable from the testimony that the driver of the automobile, in order to clear the team wagon which was proceeding in the centre of the street, went to the left of it and was running the automobile on that side of the street when the appellant was struck.

Under the Traffic law of this state the driver of a vehicle is required to pass the vehicle ahead of him to the left. That requirement, however, is subject to the conditions existing in the highway and does not relieve the driver of the passing vehicle from the duty of exercising reasonable care to ascertain whether he can pass the vehicle ahead with safety to other vehicles or pedestrians which, or who may, happen to be on the left side of the street. *Smith v. Barnard*, 82 N. J. L. 468.

From what has been said it is manifest that the question, whether or not the appellant had acted with reasonable care in the circumstances which confronted him at the time he

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made the attempt to cross the street, was one for the jury and not for the court to pass upon.

In *Fox v. Great Atlantic and Pacific Tea Co.*, 84 N. J. L. 726, 728, this court quoted with approval the statement made by Mr. Thompson, in his valuable work on negligence, to the effect that cases of collision on highways almost invariably involve questions of concurrent negligence on the part of both actors; and that, as the circumstances attending such injuries are within the range of every day observation and experience, the question of contributory negligence, in those cases, is in a peculiar sense a question for a jury, though, of course, within the limits of the principle that there must be evidence tending to that conclusion, and subject also to the rule that, in cases where the evidence tends only to that conclusion, the judge can decide it as a matter of law.

The judgment of nonsuit will be reversed.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 13.

THE STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
NATHANIEL SHAPIRO, PLAINTIFF IN ERROR.

Submitted December 6, 1915—Decided June 19, 1916.

1. An appellate court will not review matter assigned for error unless the record shows it was assigned for error in the court from whose judgment the appeal was taken.
2. Where the date of the offence in a criminal prosecution is not of the essence of the offence, it is always open to the state to offer proof that the offence charged was committed on any day within the period covered by the statute of limitations; but the date on which the offence was committed may relatively become, like any other fact in a case, a matter of vital importance. So,

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where a physician was charged with unlawfully using instruments upon a deceased woman to effect an abortion, on the 15th day of January, and the defence interposed was that the first and only occasion on which an instrument was used upon deceased by defendant was on January 27th, and then under such circumstances as legally justified the act, and it was not contended by the state that what the defendant did on January 27th was unlawful, it was error for the trial court to charge the jury that it was their duty to find the defendant guilty under the indictment, even though they found that January 15th was not the correct date, but some other date at or about that time, was when defendant first introduced the instrument into the person of the deceased, the practical effect of the instruction being that the jury must convict defendant even though the instrument was used for a justifiable cause.

On error to the Supreme Court.

For the plaintiff in error, *Frank M. McDermit* and *Robert Carey*.

For the defendant in error, *Frederick F. Guild*, prosecutor of the pleas, and *Wilbur A. Mott*, assistant prosecutor of the pleas.

The opinion of the court was delivered by

KALISCH, J. The Supreme Court affirmed a judgment on a conviction of the plaintiff in error in the Essex County Quarter Sessions of having, by the use of instruments and without lawful justification, performed an abortion upon Rose Lebowitz, in consequence of which she died. The indictment alleges that the offence was committed on the 15th day of January, 1913, and contained four counts, but we are only concerned with the first and fourth counts which charged the plaintiff in error with the unlawful use of instruments with a criminal intent, and upon which counts the conviction in this case was had.

The record now here for review shows that when this case was before the Supreme Court there were no specifications of causes filed in that court and that the plaintiff in error there relied solely on the assignments of errors filed in the cause,

and, therefore, we have disregarded the specifications of causes for reversal, which were for the first time filed in this court, and confined our consideration of the appeal to questions raised by the assignments of errors only. This court will not review matter assigned for error unless it appears that it was assigned for error in the court from which the appeal was taken. *Marten v. Brown*, 81 N. J. L. 599; *Ballschinger v. Robinson*, 83 Id. 739.

The contention of the plaintiff in error that the court erred in admitting in evidence the dying declaration of Rose Lebowitz is without merit. There was testimony to support the finding of the court that the declarant was under a sense of impending death when she made her statement. The testimony on that point was plenary. Dr. McKenzie, the county physician, who reduced the declarant's statement to writing, testified: "I told her that she was going to die and asked her if she realized it, and she said yes, and I asked her if she would make a statement of the facts in her case in the presence of death, and she did—she said she would."

It appears that the declarant's mind was clear at the time. Her written statement closed with these words: "I say this, knowing I cannot get well and in the presence of death." She signed it with a cross, on account of her physical weakness, and she died within an hour and a half afterward.

Since there was evidence tending to support the finding of the trial judge such finding will not be reviewed. *State v. Monich*, 74 N. J. L. 522. It is next insisted that the trial court erred in excluding the hospital records which consisted of temperature charts as well as a record of the patient's physical condition and treatment. The records in themselves were not evidential and therefore were properly excluded. The case of *State v. Hinckley*, 9 N. J. L. J. 118, relied on by counsel for plaintiff in error to support their admissibility as evidence, was a case where the conduct and management of the hospital were in question, and, therefore, Mr. Justice Depue, who presided at the trial, allowed in evidence the ward books and other records which contained, in the ordinary course of the business of the hospital, statements of the food, medi-

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cines, &c., supplied to patients, because they were in the nature of declarations made by the person under whose charge the entries were made. In that material respect the situation there differed from the one we are now considering. It further appears that in the present case the trial judge permitted the nurses who kept the chart to testify to the entries they made thereon of the physical condition of the patient and permitted them to use the chart to refresh their memories, but refused to permit them to testify to remarks contained on the chart and made by an interne of the hospital. The trial judge pursued the proper course.

It is next argued that the court erred in charging the jury in these words: "It has been suggested that possibly the date in the indictment has not been shown to be the correct date of the first introduction of an instrument by the defendant into the person of Rose Lebowitz; if the jury finds that the 15th day of January is not the correct date, but some other date at or about that time is the correct date, the jury have a right under the indictment, and it is their duty to find the defendant guilty."

Where the date is not of the essence of the offence it is not necessary to prove that it was committed on the date laid in the indictment. In that respect it is always open to the state to offer proof that the offence charged was committed on any day within the period not covered by the statute of limitations. *State v. Lyon*, 45 N. J. L. 272. But the date on which the offence was committed, though not an ingredient of the offence, may relatively become, like any other fact in a case, a matter of vital importance. The present case forcibly illustrates this view. The indictment charged the plaintiff in error with unlawfully using instruments upon the deceased on the 15th day of January, 1913. The witnesses for the state, who testified as to the time when the plaintiff in error first introduced an instrument into the person of the deceased, fixed the time with such uncertainty that it may be reasonably inferred from their testimony that it was on some day between January 15th and January 27th, 1913. The de-

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fence interposed was that the first and only occasion on which an instrument was used by the plaintiff in error upon the deceased was on January 27th, and then under such circumstances as legally justified the act. There was uncontradicted testimony in the case, to the effect that on the 27th day of January, 1913, the plaintiff in error received a telephone message, on behalf of the deceased, that the deceased was bleeding and needed immediate aid, and that he responded to the call at once and found the deceased bleeding profusely from the uterus; that he made a digital examination and found that an operation was necessary, and thereupon he called into consultation with him another surgeon who agreed with him that the womb of the deceased needed curetting, which operation the plaintiff in error performed and which necessarily required the introduction of an instrument into the womb of the deceased.

It was not contended at the trial, nor is it now contended, by counsel for the state, that what the plaintiff in error did on that occasion was unlawful. The theory of the state rests upon the claim that at the time the plaintiff in error first introduced an instrument into the womb of the deceased, it was for the unlawful purpose charged in the indictment. The plaintiff in error denied that he saw the deceased at any time before the 27th of January, and that it was on that date that he first introduced an instrument into the person of the deceased in the performance of a necessary operation required to be performed by the physical condition in which he found the patient.

There was, therefore, an issue of fact sharply drawn between the state and the plaintiff in error as to the time when the instrument was first used by the plaintiff in error, and whether for an unlawful purpose, as claimed by the state, or for a lawful purpose, as claimed by the plaintiff in error. The date of January 27th became an important and material fact in the case. If it was on that date that the plaintiff in error first used the instrument upon the body of the deceased, in the performance of a necessary operation, then his act was justifiable.

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That the plaintiff in error went to the residence of the deceased on that day and performed the operation of curetting the womb was an undisputed fact in the case.

The vice in the instruction complained of lies in the fact that the trial judge told the jury that it was their duty to find the defendant guilty under the indictment, even though they found that January 15th was not the correct date, but some other date at or about that time was when the defendant first introduced an instrument into the person of Rose Lebowitz, thus practically instructing the jury to convict the plaintiff in error if they found that the 27th day of January was the date on which the plaintiff in error first introduced an instrument into the person of Rose Lebowitz, irrespective of the fact whether or not it was done in the necessary performance of a perfectly legitimate operation. The harm that was done to the plaintiff in error is too obvious to need further comment. It is apparent that the court's instruction eliminated from the consideration of the jury, if they found January 27th to be the correct date on which the plaintiff in error first used an instrument on the person of the deceased, a fact which was for the jury to decide—that is, whether or not it was then used with a criminal purpose or for a justifiable cause.

For this reason the judgment under review must be reversed.

For affirmance—BERGEN, BLACK, WILLIAMS, JJ. 3.

For reversal—THE CHANCELLOR, SWAYZE, TRENCHARD, PARKER, KALISCH, WHITE, TERHUNE, HEPPENHEIMER, TAYLOR, JJ. 9.

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LOUIS F. BEACHNER, PLAINTIFF-RESPONDENT, v. DOMENICO JENGO, DEFENDANT-APPELLANT.

Submitted March 7, 1916—Decided June 19, 1916.

1. An assignment by a corporation is duly proven by the testimony of the subscribing witness, who knows the president of the corporation, who saw him sign, who knows the seal of the corporation and saw it affixed.
2. An admission that the money sued for is due is competent evidence unless made without prejudice, or unless the party making the admission has been led to believe, by the conduct of the adversary, that a compromise may probably be effected.

On appeal from the Supreme Court.For the plaintiff-respondent, *John J. Fallon*.For the defendant-appellant, *A. Orestes Ciccarelli*.

The opinion of the court was delivered by

BLACK, J. The action in this case was brought to recover a balance alleged to be due, on three promissory notes and a book account, for goods sold and delivered by Kips Bay Brewing and Malting Company to the defendant, assigned by the malting company to one Hugh P. Skelly, the president of the said company, and by Skelly assigned to the plaintiff. The value of two unexpired licenses was subsequently withdrawn from the case by consent. The trial court, at the close of the case, directed a verdict for the plaintiff for the sum of eight hundred and eighty-one dollars and thirty-three cents (\$881.33), being the amount of the plaintiff's claim, less the value of the two unexpired licenses, one hundred and fifty-eight dollars (\$158). To this ruling of the trial court there was no exception taken, nor is it made one of the grounds of appeal. Hence, it is not brought under review.

At the trial, however, there was objection, but no exception noted, to the admission in evidence of the written assignment made by the Kips Bay Brewing and Malting Company to

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Hugh P. Skelly, and also a like objection to a question put to a witness, Mario Di Blasi, viz., whether Mr. Jengo, the maker of the promissory notes, and the one to whom the credit for the goods delivered was given, admitted to him, at the court house, on a previous occasion, when the case was on the day call of the court for trial, that he owed the moneys sued for. If we assume that these questions are properly before this court for decision, within the cases of *Kargman v. Carlo*, 85 N. J. L. 632, and *Benz v. Central Railroad Company of New Jersey*, 82 *Id.* 197, we need say, only, that they have no legal merit.

Under the first point the assignment was duly proven by the subscribing witness, Mario Di Blasi, in the usual manner in which deeds by a corporation are proven, viz., by the testimony of the subscribing witness, who knows the president of the corporation, who saw him sign it, who knows the seal of the corporation and saw it affixed. *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460.

So, the testimony of Mario Di Blasi, as to the admission of Mr. Jengo, that he owed the money sued for. Such an admission is competent, and so held by this court, unless it is expressly stated that the admission was made without prejudice, or unless the party making the admission has been led to believe, by the conduct of the adversary, that a compromise may probably be effected. *Richardson v. International Pottery Co.*, 63 N. J. L. 248. In 2 *Wigm. Ev.*, §§ 1061, 1062, the reason of the rule is stated and amplified. The principle is illustrated, as applied to a variety of facts, in a collection of many cases. 16 *Cyc.* 946.

There being no error in the record the judgment is therefore affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 16.

For reversal—None.

W. A. MANDA, INCORPORATED, APPELLANT, v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, LESSEE OF THE MORRIS AND ESSEX RAILROAD COMPANY, RESPONDENT.

Argued March 16, 1916—Decided June 19, 1916.

1. The rulings of the trial court, admitting and rejecting evidence at the trial of this case, were not error. They were within the discretion of the trial judge.
2. The trial judge has the undoubted right to make comments upon the testimony so long as he leaves it to the jury to determine the facts and draw their own conclusions.
3. When land is taken by condemnation, trees and top soil thereon are a part of the land. They should not be valued separately and apart from the land by the jury, but may be taken into consideration in determining to what extent if any, the value of the land is thereby enhanced.
4. Under the Condemnation act (*Pamph. L. 1900, p. 81, § 6*), the value of the land taken and the damages are to be ascertained, as of the date of the filing of the petition and order thereon.

On appeal from the Essex County Circuit Court.

For the appellant, *Vredenburg, Wall & Carey*.

For the respondent, *Maximilian M. Stallman*.

The opinion of the court was delivered by

BLACK, J. This case was tried in the Essex Circuit Court. It is an appeal from the verdict of a jury, fixing the amount of money to be paid by the respondent, for taking land under condemnation for its additional right of way. The strip of land taken, with the plants and shrubbery growing thereon, is in the village of South Orange. The dimensions of the land are about twenty to sixty-two feet in width and one thousand feet in length, containing a trifle less than nine-tenths of an acre.

The errors assigned for the reversal of the judgment en-

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tered on the verdict of the jury are alleged trial errors. There are seventeen assignments of error and they are directed to the exclusion and admission of testimony, over the objections of the appellant; alleged errors, in the charge of the court to the jury, and the refusal, by the trial court, to charge as requested.

It would serve no useful purpose to bring under discussion, in detail, all the alleged errors argued by the appellant in this case. Some of the more important ones, however, may be noticed briefly. Thus, Louis H. Pierson, a witness, who described himself as having been engaged in the building business, to a certain extent, building large barns and houses, was not permitted to testify as to the value of the brick buildings on a certain piece of land, which had been put in evidence for comparison. This was not harmful error, nor was it error to exclude this question put to the appellant. Mr. Manda, "Now, will you tell us, if you are able to, what percentage of decrease in the valuation of this shaded land will probably arise because of this embankment concerning which you have testified, and the proposed use of this property for railroad purposes?" This was ruled out on the ground that the evidence sought to be elicited was speculative. And so, a question put to the same witness, "What allowance have you made for the value of the buildings on the Pierson property?" was overruled, on the ground that the witness had not qualified on the question of value.

Who is entitled to be considered as an expert, from the nature of the case, must be left very much to the discretion of the trial judge and his decision is conclusive, unless clearly shown to be erroneous in matter of law. *New Jersey Zinc Co. v. Lehigh Zinc Co.*, 59 N. J. L. 189, 194; *Elvins v. Delaware, &c., Tel. Co.*, 63 Id. 243, 247.

So, the admission of evidence, as to the amount paid for Cameron field. This was objected to on the ground of dissimilarity between that and the property under consideration. This manifestly was within the discretion of the trial judge. In this class of cases, there is no inflexible rule, which limits the period of time or the distance over which the inquiry

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may be extended, as to the market value of other lands or the situation or use of such lands in the vicinity, whether fairly comparable with the lands taken. How far such investigation may be carried must be left in a great measure to the sound discretion of the trial court and, unless it appears that the rulings of the trial judge on such matters as are within his discretion worked some injury to the appellant, they will not be disturbed. *Packard v. Bergen Neck Railway Co.*, 54 N. J. L. 553; *Montclair Railroad Co. v. Benson*, 36 *Id.* 557.

So, the question was asked a witness, Julius V. Burgeman, "How do the prices in the catalogues which you have examined for this class of stock, compare with the prices which you have marked on this inventory?" The answer was, "About the same as those in the catalogue." The judge, in his charge to the jury, very properly limited the use which the jury should make of this evidence, when he said the jury must not accept, as evidence of value, the catalogue of the Elizabeth Nursery. It is received only for the purpose of showing the source from which the witness derived his knowledge. We have no evidence as to the standing or character of the nursery in question.

The charge of the judge deals with the law applicable to the case and reviews the evidence, summarizing it with skill and clearness. This was the undoubted right of the trial court, so long as he leaves the jury to determine the facts and draw their own conclusions. *Foley v. Loughran*, 60 N. J. L. 464, 477.

Objection is taken to this passage of the judge's charge: "In this case it appears that on the land condemned were a number of large fixed trees, not nursery stock, and a layer of top soil. These trees and the top soil are a part of the land and cannot be valued separately and apart from the land, but may be taken into consideration to determine to what extent, if any, the value of the land is enhanced for a fair sale in the market." This is an accurate statement of the law applicable to the case. *Lew. Em. Dom.*, § 724; 15 *Cyc.* 758. We fail to find any error in the charge.

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Nor was there any error in the refusal to charge, as requested, although the record shows that just as the jury were about to retire Mr. Carey asked the court to call the attention of the jury to the point that the value of the property is to be considered as of the time when the condemnation proceedings were commenced, by the filing of the petition and the order thereon. This, of course, is a correct statement of the law, as provided by statute. *Pamph. L.* 1900, p. 81, § 6. The court, in reply, said there had not been shown to be any difference on this subject. The record shows that throughout the trial the testimony was directed to this time, in making the valuations, by the witnesses. The court had already charged the jury that the value of the nursery stock should be considered in its condition in the ground at the time of condemnation. It was not error for the court to refuse to further charge the jury on this point at that time. Finding no error in the record, the judgment of the Essex County Circuit Court is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

For reversal—None.

PHILADELPHIA PICKLING COMPANY, PLAINTIFF-APPELLANT, v. MARYLAND CASUALTY COMPANY, DEFENDANT-RESPONDENT.

Argued March 21, 1916—Decided June 19, 1916.

1. "Paid and satisfied" in a manufacturer's employer's liability policy of insurance, as applied to a judgment, mean when the judgment is fully paid. The judgment to be paid and satisfied does not necessarily mean canceled of record.

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2. There is no legal liability of an insurance company, to a corporation other than the assured, to whom the policy has been transferred by the assured, after the policy under its terms had expired, under an agreement, by which the assets and liabilities of the assured were transferred to the new corporation.

On appeal from the Supreme Court.

For the plaintiff-appellant, *Wilson & Carr*.

For the defendant-respondent, *Richard F. Jones and Marshall Van Winkle*.

The opinion of the court was delivered by

BLACK, J. This is an appeal from the second trial of this case. The first trial resulted in a verdict for the appellant for the sum of \$4,356.01. This verdict was set aside by the Supreme Court. A second trial was had, and at that trial a stipulation in writing was made that the case be submitted to the jury, upon the printed record of the first trial used in the Supreme Court. This resulted in the direction of a verdict for the respondent, by direction of the trial court, in accordance with the opinion of the Supreme Court setting aside the first verdict. It is the propriety of this ruling by the trial court that is brought under review by this appeal. The case cannot be intelligently considered without a statement of the dominant facts, which are somewhat voluminous.

The action was brought by the Philadelphia Pickling Company, a corporation, the appellant, against the Maryland Casualty Company, the respondent, upon a manufacturer's employer's liability policy of insurance. The policy was in the usual form of liability insurance policies. Walter Chambers, an employe of the assured, on September 19th, 1907, while the policy was in force, was injured at the assured's factory at Eldora, New Jersey. Chambers brought suit against the assured, recovering a judgment on January 5th, 1909, for \$4,000. The policy had been issued to "Philadelphia Pickling Company," which was in reality Sallie

Wittenberg. She had adopted that name for her business, and had taken out her employer's insurance in that trade name. However, after verdict and before final judgment in the Chambers suit, viz., on the 7th day of November, 1908, by an agreement, in writing, Sallie Wittenberg, called also the Philadelphia Pickling Company, transferred her business to the plaintiff-appellant, the corporation, which took over the assets and assumed the liabilities of the trade name, including any claim then existing or thereafter to be made by Walter Chambers, for which suit had already been brought. The policy of the Maryland Casualty Company involved in this suit was passed, or attempted to be passed, by a parol transfer and delivery. Subsequently, Chambers sued the corporation, the appellant, in an action on contract. This action was based upon the judgment obtained in the tort action against the trade name, the Philadelphia Pickling Company, and the assumption by the corporation of the assets and liabilities of the trade name under the written agreement. A judgment was obtained on December 19th, 1911, for the sum of \$4,816.05, which was affirmed by this court *Chambers v. Philadelphia Pickling Co.*, 83 N. J. L. 543. The same case was on demurrer to the declaration in the Supreme Court. *Chambers v. Philadelphia Pickling Co.*, 79 Id. 1. The Philadelphia Pickling Company, the corporation, the appellant and plaintiff below, paid Chambers the amount of a judgment; hence the present suit to recover from the respondent and defendant below, the Maryland Casualty Company, the amount so paid. The action is claimed by the respondent to be in defiance of the conditions contained in the policy. The ruling of the trial court was in favor of the respondent. The appellant prosecutes this appeal and seeks to have the judgment reversed.

The alleged errors, it is argued, arose out of the terms of the policy of insurance, and will be considered, so far as is necessary, to a determination of the case.

Thus, the policy requires that action shall be brought within ninety days after the judgment has been "paid and satisfied." The judgment was paid and satisfied by October

31st, 1913. The action was not begun until May 5th, 1914, when the ninety days had expired. It was on this point the Supreme Court reversed the judgment. The appellant now urges that the action of the Supreme Court was error, upon an argument which is twofold. First, the above condition or limitation was wholly dependent upon the concurrent performance, by the insurer, of its obligation to defend the action brought by an employe against its assured, and second, the limitation by its own terms had no application to the present suit. Without attempting to pursue this line of argument to the conclusion reached by the appellant, it is sufficient to say, we do not so read or apply the time limitation of the policy. Counsel concedes, standing by themselves, the correctness of the grounds, assigned by the Supreme Court, for its conclusion, but say the court overlooked the argument, as stated above. On the construction of the terms the Supreme Court held that satisfaction does not mean satisfied of record. It means satisfaction in the ordinary sense, which the man in the street would understand the word, viz., that when the judgment was paid in full it was satisfied. The Supreme Court said the appellant sought to escape the difficulty upon the ground that forty cents was paid by the attorney to Chambers' attorneys for satisfaction pieces and for canceling the judgment, thus extending the ninety days in which to bring the suit, the judgment having been previously paid. Satisfied and paid are here synonymous. So, in the act concerning judgments, section 22, there is a clear distinction between satisfaction and acknowledgment of satisfaction upon the record of a judgment. On this point we are satisfied with the reasons and conclusion of the Supreme Court. The trial court was not, therefore, in error in following the ruling of the Supreme Court.

Another fundamental difficulty with the plaintiff's case is this: The policy was issued to Sallie Wittenberg, under the trade name of Philadelphia Pickling Company, in 1906. It makes no difference that she was then operating under the trade name of the Philadelphia Pickling Company. The business was in fact Sallie Wittenberg's; the insurance was

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the insurance of Sallie Wittenberg. The injury to Chambers happened September 19th, 1907. He brought suit against Sallie Wittenberg under the trade name of the Philadelphia Pickling Company, on April 1st, 1908, obtaining a verdict September 30th, 1908. Thereafter there were proceedings for a new trial. On November 7th, 1908, the present plaintiff was incorporated as the Philadelphia Pickling Company. The policy had expired November 25th, 1907, so that, at the time the appellant was incorporated there was no policy and the injury had happened a year before. Clearly, the appellant cannot recover as the assured under the policy. The difficulty, however, is this: Sallie Wittenberg never suffered any loss. She never paid any money. The money that was paid was paid by the present appellant, the Philadelphia Pickling Company, incorporated. It paid by installments and satisfied a judgment recovered against it upon a contract which it had made with Sallie Wittenberg. The case on demurrer, the Supreme Court held that the declaration framed on this agreement set out a good cause of action; that a contract made between A and B, by the terms of which B agrees to pay a debt, which A owes to C, is a contract for the benefit of C within section 28 of the Practice act. *Chambers v. Philadelphia Pickling Co.*, 79 N. J. L. 1; 83 *Id.* 543. That case was in contract, so the judgment recovered against the appellant in that action was based upon a contract. After the payment of the amount of a judgment, both judgments, *i. e.*, the tort judgment and the contract judgment, were satisfied of record. The present appellant, the Philadelphia Pickling Company, cannot recover on the contract made by it with Sallie Wittenberg after the policy of insurance had expired and obtain any rights under the policy. There was no loss under the policy. While it is true Sallie Wittenberg had assigned her cause of action, she could not assign any loss, for she had already had that loss made good to her by the Philadelphia Pickling Company, not by way of indemnity, but as a part of the purchase price of the property.

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Condition F of the policy provides: "No action shall lie against the company to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within ninety (90) days after such judgment, by a court of last resort, against the assured has been so paid and satisfied. The company does not prejudice by this condition any defences to such action it may be entitled to make under this policy."

This view disposes of the case and renders it unnecessary to further consider the interesting points raised and discussed at some length in appellant's brief, such, as whether the work that Chambers was doing, at the time of the injury, was covered by the terms of the policy; or whether the action was brought by the assured for a loss actually sustained and paid in money by the assured in satisfaction of a judgment, after trial of the issue, as provided by the terms of the policy; or whether there was a breach of the warranties of the policy.

Finding no error in the record the judgment is therefore affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

For reversal—None.

Atlantic Pebble Co. v. Lehigh Valley R. R. Co.89 N. J. L.

THE ATLANTIC PEBBLE COMPANY, LIMITED, PLAINTIFF-
APPELLANT, v. LEHIGH VALLEY RAILROAD COMPANY,
DEFENDANT-RESPONDENT.

Argued March 7, 1916—Decided June 29, 1916.

1. Where a railroad company contracts to furnish free storage for a cargo of pebbles pending their reshipment, from time to time as sold, over its lines to customers throughout the country, but the contract does not specify any fixed time for such sales and reshipments, the presumption is that the parties contemplated that the same would take place within what would under all the circumstances be a reasonable time from the commencement of such free storage for the making of such sales and reshipments.
2. The fact that one party may have expected that this time would be shorter than the other did, does not constitute a failure of the meeting of the minds of the parties necessary to a valid contract.
3. Where a promise has for its subject-matter something which by the terms of the agreement is left to depend for its very existence upon the future election of the promisor, it will not form a valid consideration for an executory contract; but where such subject-matter, in the normal and *bona fide* course of events as contemplated by both parties, is not thus left dependent, it will form such valid consideration, although there may be elements of quantity, requirement, selection, &c., agreed to be left to the future discretion of the promisor.
4. The executed consideration for a promise is sufficient, if, induced by the request expressed in or properly implied from the promise, it be a benefit to the promisor, or a loss or detriment to the promisee.
5. Where a promise is in effect an offer contemplating acceptance by performance of a certain condition coupled with the entering into of a reciprocal promise by the offeree at the time of such performance, the performance of the condition under the circumstances contemplated, before a withdrawal of the offer, gives rise to a valid executory contract wherein the original promise is supported by the reciprocal promise arising upon the performance of the condition, irrespective of whether such performance is a benefit to the promisor or a detriment to the promisee.

On appeal from a judgment of nonsuit entered by the Circuit Court of Somerset County.

For the appellant, *John F. Reger*.

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For the respondent, *Charles B. Bradley (Collins & Corbin on the brief)*.

The opinion of the court was delivered by

WHITE, J. This suit was brought to recover \$5,657.12, being the amount of certain storage charges paid under protest by the appellant upon a large quantity of flint pebbles belonging to it, and which it shipped by boat from Newfoundland to the covered pier of the Philadelphia and Reading Railroad Company in Philadelphia, in pursuance of an arrangement with the respondent, a railroad company with whose lines the Philadelphia and Reading Railroad Company's lines connected, whereby the respondent had agreed that if appellant would make such shipment and would then from time to time reship over respondent's railroad, paying its proper freight charges for such reshipments, as sales were made of the pebbles into the interior of the country, wherever respondent should offer equally satisfactory facilities and rates with other lines, the respondent would furnish on such pier free storage facilities for said pebbles while awaiting such sales and orders for reshipment. In pursuance of this arrangement two shiploads of pebbles had been shipped and placed on said pier at Philadelphia and had remained there, as to part of the first cargo at least, without storage charge for a year, while sales were being made, and the portions of both cargoes which were sold were, as sold, reshipped over respondent's lines and its freight charges therefor were duly paid. When it was proposed to ship a third cargo the respondent objected to the length of time which seemed to elapse before sale of all the pebbles of each cargo was completed, and stipulated that unless an additional six hundred tons of the stock of pebbles then on the pier were first "moved," that is sold and reshipped, the respondent would not furnish free storage for the third cargo. Appellant thereupon sold and reshipped over respondent's lines the six hundred additional tons as thus required, and the third cargo was thereupon shipped with respondent's express consent and placed on the covered pier under the terms of the arrangement. Some two months

later respondent notified appellant that the latter would forthwith have to remove the pebbles from this pier as the Philadelphia and Reading Railroad Company needed the space which the pebbles occupied, and that respondent would not thereafter furnish free storage for the pebbles. Appellant declined to accede to this demand, claiming that it was a violation of respondent's contract; whereupon the pebbles were placed by the Philadelphia and Reading Railroad Company in storage with the Philadelphia Warehousing Company subject to appellant's order and at its expense. Appellant then sold the pebbles as rapidly as possible and reshipped them over respondent's lines, but was compelled to and did pay, under protest, to the Philadelphia Warehousing Company the storage charges, the amount of which it now claims as damages for the breach by respondent's contract to furnish free storage.

The learned trial judge took the view that the agreement to furnish free storage was without consideration and entered a judgment of nonsuit.

It is now urged in support of this judgment, first, that the contract was without consideration; second, that as to the pebbles in question, to wit, those which had not been sold and reshipped over respondent's lines, the arrangement was at most but an outstanding proposal revocable at any time before acceptance by such reshipment, and that it was in fact revoked before such acceptance; third, that there was no meeting of the minds of the contracting parties, because one of them contemplated a much shorter period of free storage than the other did, and fourth, that respondent's undertaking was revocable at any time because at most it contemplated the procuring of a mere revocable license. With the exception of three minor points which are treated as incidental to the foregoing, as in fact they are, no other grounds for supporting the judgment were urged nor have we considered any other ground.

As to the third point—that the minds of the parties did not actually meet because one of them contemplated a shorter period of free storage than the other did, it is sufficient to

say that the difference, if any, was a difference in expectation as to the time which would be required for performance, rather than a difference as to the terms of the agreement itself. This is clearly indicated by respondent's letter to the appellant when protest was made prior to the shipment of the third cargo from Newfoundland, wherein it said, "It was not expected at the time of the original arrangement that the property would be held for so long a period and the space available for this purpose on terminals of the Philadelphia and Reading Railway is largely occupied;" and again, on October 27th, 1911: "As stated in my letter yesterday, you are holding these pebbles beyond the time originally contemplated, and we shall expect you to handle them more freely in the future." Either this language means "the time originally contemplated" by *both parties*, in which case of course the minds did meet, or else it means contemplated or expected by the respondent alone.

It may well be that one party did expect that each cargo of pebbles would be sold within two months after being placed on the railroad pier at Philadelphia, and that the other expected that a longer time would be consumed. Neither party, however, saw fit to make this expectation one of the terms of the contract, but both were content with the general stipulation that the free storage should continue until the pebbles should be sold. So far as the express terms of the contract were concerned, therefore, there was a complete meeting of the minds, and in the absence of a provision defining the time for complete performance, the presumption is that such performance was to be within a reasonable time. What that is depends upon the circumstances of each case. Both parties are presumed to have had in mind, as an unexpressed term of the contract they entered into, a period for complete performance, which, in view of the existing conditions, and viewed in the light of their own actions, it is reasonable to suppose they had in contemplation. Not having seen fit to reduce it to definite, expressed form, the circumstances surrounding the transaction, taken in connection with its character or nature, and the actions of the parties themselves, will deter-

mine this unexpressed and otherwise undefined term of the contract. One of the parties to such a contract cannot, therefore, escape its obligations on the ground that he expected it would be performed within a shorter time than that which, under the circumstances, was a reasonable time for its performance. What was a reasonable time in the circumstances of this case was clearly a jury question. There was ample evidence arising not only from the character of the merchandise but from the actions of the parties themselves with reference to the two previous cargoes, to indicate that a longer period than two months was reasonable for the completion of the sales of the third cargo. The nonsuit cannot, therefore, be sustained on the ground that the minds of the parties did not meet as to the time of performance.

. Turning now to respondent's first claim, and the one upon which the learned trial judge rested his decision, namely, that the promise of free storage was without consideration—it is urged that the pebble company, appellant, did not promise to ship any pebbles at all to Philadelphia in pursuance of the arrangement, and that consequently there was no reciprocal undertaking on the part of the appellant to support the promise by the respondent.

The doctrine of a purely executory contract, where the reciprocal promises depend upon each other for support, is of course elementary. Cases in this state are: *Buckingham v. Ludlum*, 40 N. J. Eq. 422, affirmed in 41 *Id.* 348, and *United and Globe Rubber Co. v. Conard*, 80 N. J. L. 286. The trouble is sometimes to determine what are and what are not such promises. While it seems difficult to entirely harmonize all of the decisions bearing upon the phase of this doctrine here involved, there are two cases in Massachusetts, one of which is a fair illustration of circumstances which do not constitute such a promise as will support the reciprocal agreement, and the other of circumstances which do constitute such a promise. In *Thayer v. Burchard*, 99 Mass. 508, the defendants, who were operating a railroad for the benefit of bondholders, wrote to the plaintiffs, who were grain merchants

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buying flour and grain in the west, that defendants would transfer flour and grain at \$4 per ton, "this rate to continue in force until the close of navigation unless notice to the contrary." The plaintiffs answered: "We accept the proposal." It was held that this constituted a mere offer on the part of the defendants and was not a contract, because the plaintiffs did not come under any obligation to the defendants to furnish any flour or grain for transportation, and were at liberty to buy grain or not, as they chose, and if they bought it to ship it by defendants' road or by other lines, just as they saw fit. In *Burgess Sulphite Co. v. Bloomfield*, 180 *Id.* 283; 62 *N. E. Rep.* 367, on the other hand, the agreement was: "to buy at \$12 per ton all the old scrap iron that you desire to sell, you to select the same," which agreement was "accepted" by the seller. This contract was made with reference to old machinery and other scrap iron which the seller was about to cull out of his mill which the parties looked over at the time. The court held that there was a binding obligation upon the part of the seller to sell to the purchaser all the scrap iron then in the seller's mill and yard, which, in the contemplation of both parties, it was the seller's then present purpose to sell, the selection only being left to him instead of both parties being put to the additional waste of time and expense of culling out the scrap iron before making the contract; and that it consequently constituted a valid consideration for the purchaser's undertaking to pay for it at the price stipulated. Numerous other cases illustrative both of promises not sufficient to constitute a valid consideration and promises which are sufficient are cited in *Willis. Sales* 798.

The distinguishing principle may possibly be stated to be that where the promise has for its subject-matter something, which by the terms of the contract is left to depend for its very existence upon the future election of the promisor, it will not form a valid consideration for an executory contract, but where such subject-matter, in the normal and *bona fide* course of events as contemplated by both parties is not thus left dependent, it will form such valid consideration, although

there may be elements of quantity, requirement, selection, &c., agreed to be left to the future discretion of the promisor.

In the present case, the promise to reship over the lines of the respondent company was left to depend entirely upon the contingency of whether or not the appellant should decide to ship any pebbles at all to Philadelphia. We think, therefore, that standing alone and without further action on the part of the appellant, the promise of free storage by the respondent cannot be supported as a purely executory contract by the reciprocal stipulation or promise that if appellant did send pebbles to Philadelphia, it would reship them over respondent's lines, because the entire existence of the subject-matter of the latter promise was left to depend upon the future voluntary discretion of the appellant.

We do think, however, that the promise of free storage as here made was an offer on the part of the respondent which contemplated acceptance, so far as the sending of the pebbles to Philadelphia was concerned, by performance on the part of the appellant, and that there was such performance. The promise was, "if you will ship a cargo of pebbles to Philadelphia, and reship them exclusively over our lines as sold, we will furnish you free storage." As above stated, the appellant did not undertake to ship any pebbles to Philadelphia, but if it did do so in pursuance of that offer, while that offer remained open for acceptance by performance, there was an acceptance of the offer by performance, which, if a benefit to the promisor or a detriment to the promisee, completed a binding contract.

The broad doctrine upon this point may be stated to be that the executed consideration for a promise is sufficient, if, induced by the request expressed by, or properly implied from, the promise, it be a benefit to the promisor or a detriment to the promisee. *Holt v. United Security Life Insurance Co.*, 74 N. J. L. 795, citing *Shadwell v. Shadwell*, 9 C. B. (N. S.) 159; *S. C.*, 6 Rul. Cas. 9 and notes, and *Conover v. Stillwell*, 34 N. J. L. 54.

There is, however, another element in the contract which

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we think rendered the promise of free storage binding upon the respondent upon the shipment of the pebbles to Philadelphia as stipulated in the offer, quite irrespective of whether what appellant did was a detriment to it or a benefit to respondent. This element consists in the fact that by actually shipping the pebbles to Philadelphia and placing them on the pier provided by respondent and claiming free storage for them on that pier in pursuance of respondent's offer and request, the appellant agreed to respondent's stipulation that reshipment should be made exclusively over the latter's lines. In effect, respondent's proposition was, if you decide to ship a cargo of pebbles to Philadelphia, and do ship them, and will thereupon agree to reship exclusively over our lines, we will furnish free storage for them until sold. Acceptance of this offer was to be by performance, so far as shipping the pebbles to Philadelphia was concerned, but also by the entering into a reciprocal agreement for exclusive transportation in case of this performance. This acceptance in its entirety took place as above outlined, and, consequently, there were from the time of the placing of the pebbles on the pier in question a promise on the one side to reship exclusively (subject to certain conditions) over respondent's lines, and on the other a reciprocal promise to furnish free storage. These promises then became mutually supporting and constituted an executory contract binding upon both sides.

We think, therefore, that as to the cargo, or parts of cargoes of pebbles here involved, there arose, upon their being placed upon the pier in question, a valid contract binding upon respondent to furnish the free storage in question, and that appellant was entitled to recover its proper damages for a breach of this contract, if there was a breach of it.

This view, of course, disposes of respondent's second claim, and an examination of the evidence convinces us that the contract as entered into negatives the contention set forth in respondent's fourth claim.

For the reasons given the judgment of nonsuit is reversed and a *venire de novo* awarded.

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For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

WILLIAM S. FANSHAW, PLAINTIFF-RESPONDENT. v.
ANNIE B. RAWLINS, DEFENDANT-APPELLANT.

Submitted March 21, 1916—Decided June 19, 1916.

In an action for the board of horses where defendant relies upon a counter-claim based upon the loss of a brood mare, injured in the pasture field of plaintiff, no legal error is committed by the trial court in refusing a requested instruction, setting forth in effect that since the injury occurred while the mare was under the care and control of plaintiff, there arose from this situation a presumption of negligence upon plaintiff's part, and that the burden is therefore imposed upon him to overcome that presumption by preponderance of evidence sufficient to satisfy the jury that the injury was not caused by negligence on his part.

On appeal from the Supreme Court.

For the respondent, *John S. Applegate & Son*.

For the appellant, *Vredenburg, Wall & Carey*.

The opinion of the court was delivered by

TERHUNE, J. This is an action to recover an amount alleged to be due plaintiff from defendant for the care and board of defendant's horses. The plaintiff's claim was admitted. The defendant relied upon a counter-claim based on the value of a brood mare owned by the defendant and boarded by plaintiff with other horses of defendant, and in-

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jured while at pasture at plaintiff's stock farm, death ensuing from the injury. An employe of plaintiff noticed the mare was not acting right. A closer inspection showed a wound in her side. She was taken up, treated, her owner notified, a veterinary employed by the owner, who took charge of the case, and who afterwards discovered through an autopsy that her lung had been penetrated.

Plaintiff's claim having been admitted, the only issue left was that raised by the counter-claim. This situation, in effect, resolved itself into a transposition of the parties to the suit, as well as in the shifting of the burden of proof, the prosecution of the counter-claim being practically a separate suit. The original defendant became the plaintiff, while the burden of proving negligence was on the party setting it up.

The errors alleged are the failure of the trial judge to charge—

1. "The hole in the mare's side, in the absence of explanation by the plaintiff, raises a presumption of negligence. If there are any facts inconsistent with negligence, it is the plaintiff's duty to prove them. The burden is on Mr. Fanshawe."

2. "Unless the plaintiff has satisfied you by affirmative proof that he and his men used reasonable care in guarding the mare from injury, your verdict on the counter-claim should be for the true value of the mare."

These requests, in effect, were based upon two false assumptions—*first*, that the case is a proper one for the application of the doctrine of *res ipsa loquitur*; *second*, that the application of that doctrine relieves the plaintiff from the burden of proof and imposes that burden on the defendant.

The trial judge refused these requests, and, on the contrary, charged the jury: "Before you can set off against Mr. Fanshawe's claim the value of this horse, it must appear either that his negligence or the negligence of his employes resulted in the injury itself, or that their failure to take proper care of the mare after they discovered her injury resulted in her death."

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The purport of the maxim *res ipsa loquitur* has very recently been fully and comprehensively reviewed by Mr. Justice Swayze in the case of *Hughes v. Atlantic City and Shore Railroad Co.*, 85 N. J. L. 212, and by Mr. Justice Garrison in *Niebel v. Winslow*, 88 N. J. L. 191.

One of the legal principles established by these cases is that "the plaintiff cannot be relieved of the duty of satisfying the jury by preponderance of evidence that the defendant has been negligent, and to deprive the defendant of his right, which is a substantial one, to have the plaintiff bear the burden of the affirmative."

In a recent opinion in the case of *Sweeney v. Irving*, 228 U. S. 233, Mr. Justice Pitney said:

"The general rule in actions of negligence is that the mere proof of 'accident' does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence."

In the case before us it will be noticed that the defendant's insistence was not only that the evidence of the occurrence of the injury under the circumstances was evidential of negligence, but that it was necessary for the plaintiff to prove by preponderance of evidence that there was an absence of negligence on plaintiff's part.

This is not the law. Plaintiff was bound to give reasonable care. It was not incumbent upon him, in the absence of direct evidence showing that he had been neglectful of his obligation, to relieve the defendant of his legal duty, and take upon his shoulders the burden of exonerating himself. This

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whole case revolves around the fact that while at pasture in plaintiff's field this mare was injured. There is no evidence showing how the accident occurred, no suggestion of any precaution that the plaintiff might have employed to avoid the accident, no circumstances which could be said to show or raise the presumption that the defendant was negligent.

It is the accepted law of this state that the mere happening of an accident raised no presumption of negligence. It is incumbent to show by direct evidence the responsibility of the defendant for the accident, or to show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected. *Paynter v. Bridgeton, &c.*, 67 N. J. L. 619, 625.

In the present case, it was incumbent upon the defendant to show by preponderance of evidence that the plaintiff was guilty of negligence. The mere fact that the mare was wounded did not require a finding of negligence, for the injury might readily have resulted from a cause over which the plaintiff had no control.

We accordingly find no error in the refusal of the trial judge to charge as requested and therefore the judgment below is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 16.

For reversal—None.

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FRANK A. KLITCH, AN INFANT, BY GEORGE KLITCH, HIS
NEXT FRIEND, PLAINTIFF-RESPONDENT, v. EDWIN
BETTS, DEFENDANT-APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

1. For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given and the circumstances under which the act is done, the master is responsible.
2. Where a servant is acting within the scope of his employment, and by his negligence causes injury to a third party, the master will be responsible, although the servant's act was contrary to his master's orders.
3. This court will not consider the question of excessive damages on appeal from a judgment at law; judgments of the inferior law courts are reviewed by this court upon matters of law only.

On appeal from the Essex Circuit Court.

For the appellant, *King & Vogt*.

For the respondent, *William Hauser*.

The opinion of the court was delivered by

WILLIAMS, J. This is an appeal from a judgment recovered by Frank A. Klitch, an infant, by his next friend, against Edwin Betts, in the Essex Circuit Court, March 16th, 1915.

The plaintiff, ten years of age, was brought by his father to defendant's dental office on January 20th, 1914, at eight p. m. to have a tooth extracted. A Dr. Snively was in the employ of defendant at the time as an assistant, and his office hours were from nine a. m. to six p. m. In the absence of defendant, Dr. Snively extracted a deciduous molar tooth from plaintiff's lower left jaw, for which he was paid fifty cents. The plaintiff suffered no ache or pain after the extraction

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until January 29th, 1914, when he again went to defendant's office with his father, about eight P. M., and in the absence of defendant, Dr. Snively extracted a molar tooth next to the one he extracted January 20th, and was again paid for his services. The plaintiff had not complained of toothache until that day. Immediately after this extraction he underwent great suffering, and complained of great pain; he did not sleep that night, cried through the night and continued in great pain. On January 31st (Sunday), he again went to defendant's office with his mother, and Dr. Snively treated the injured jaw; on February 1st, he again went to defendant's office when, for the first time, defendant examined him; he also went the next day, and two days later defendant told plaintiff's mother that he thought an operation would be necessary. On the latter occasion defendant extracted a tooth, but Dr. Snively was not present; two days later defendant again examined plaintiff and again advised his mother that an operation would be necessary, but that he could not perform it. He was taken to Dr. Povey, who gave him a salve and mouth wash and attended him until February 16th, during which time plaintiff's mother also saw defendant, and it was finally decided that an operation should be performed; he was then examined by a Dr. Sherman, who treated the jaw by making an incision in it; he also advised an operation. On February 22d, Dr. Epstein examined the plaintiff and he was taken to the doctor's private hospital to be operated upon. Dr. Epstein performed the operation of scraping the bone for a condition of necrosis, which Dr. Betts, himself, says he thought was present. When this operation was performed by Dr. Epstein he says that he discovered that the boy's jaw was fractured; previous to that time he says he found *crepitus*, or the sound of scraping of one fragment of bone against another. It was found necessary to remove one-half to three-quarters of an inch of the jaw bone, as a result of which plaintiff's face is disfigured and the affected side is not as strong as the opposite. Defendant was informed of these operations in the presence of Snively. It was also testified that if in a case like the one at bar a fracture resulted from pulling the tooth, the

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operator had not exercised reasonable care. Dr. Snively testified that the tooth was a deciduous, or baby tooth, which is expelled by the permanent teeth, and that he could have dug it out with his fingers; that it had no roots; that the roots had been absorbed by natural processes, and by the growth of the permanent tooth. He, however, used a forceps, and when the father remarked, "Why, that came out very easily," he replied, "It did not come out as easy as you think it did," but he states that he made this remark because he thought the father would not want to pay him if it came out so easy.

The plaintiff rested his case on the alleged negligence of Dr. Snively in drawing the tooth, causing a fracture of the jaw bone from which necrosis resulted, and on the contention that the relation of master and servant existed between the defendant and Dr. Snively at the time of the performance of the alleged negligent act.

Motion for nonsuit was made and also a motion to direct the verdict for the defendant at the conclusion of the testimony, both of which were denied by the court, from which refusal this appeal is taken.

The defendant assigned the following errors for reversal of the verdict and judgment thereon:

(1) The court erroneously refused to grant defendant's motion for a nonsuit, on the ground that the existence of the relation of master and servant between defendant and Dr. Snively at the time of the extraction of the tooth by Dr. Snively on January 29th, 1914, was not proved.

(2) The court improperly refused to grant defendant's motion for a nonsuit, on the ground that under the proof it was impossible to ascertain the damages to be attributed to negligence, if any, on the part of Dr. Snively.

(3) The damages awarded were excessive.

(4) The court erroneously and improperly refused to grant a motion for the direction of a verdict in favor of the defendant, on the ground that there was no proof that the fracture resulted from any act on the part of Dr. Snively.

As to the first assignment of error there was evidence when plaintiff rested his case that Snively was the employe of the

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defendant, having worked for him for about two years, and was being paid wages by the defendant at the time of the injury sustained by the plaintiff. It nowhere appears that Snively was acting on his own account, or that he had permission to use defendant's office conveniences and appliances to carry on his own business, either after these hours, or otherwise, or that his name appeared on any sign or display card. The claim that the relationship of master and servant did not exist was based upon the fact that Snively's hours in the defendant's office were from nine A. M. to six P. M., and that he was not authorized to extract teeth except under the supervision of the defendant, the contention being that because the tooth was extracted after six o'clock, and in the absence of the defendant, it was the independent act of Snively, and not done in the course of his employment. What Snively did was within his implied authority, and even if done without the authority of the defendant, for any violation of general rules laid down for Snively's guidance the master is still responsible. When the defendant employed Snively and left him in charge of his office so that persons going there had a right to infer that he represented the defendant, the mere fact that it was after six o'clock did not destroy the relation of master and servant.

The general rule is a very clear one, that the master is liable for any act of his servant done within the scope of his employment, and if a servant is acting in the execution of his master's orders, and by his negligence causes injury to a third party, the master will be responsible, although the servant's act was not necessary for the proper performance of his duty to his master or was even contrary to his master's orders. *McCann v. Consolidated Traction Co.*, 59 N. J. L. 481, 487.

The application of the rule *respondeat superior* does not depend upon the obedience of the servant to his master's orders, nor upon the legality of the servant's conduct; where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the acts done may be the very

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reverse of that which the servant was actually directed to do. *Driscoll v. Carlin*, 50 N. J. L. 28, 30.

In *Holler v. Ross*, 68 N. J. L. 324, it was held that the servant of the master cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the servant did, which caused the injury, was an act which was, expressly or by necessary implication, within the line of his duty under his employment, and it cites with approval *Stone v. Hill*, 45 Conn. 44.

"For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions, the servant alone is responsible."

To rebut the presumption of liability of a master for damage consequent upon the negligent act of a servant, done within the apparent scope of the latter's employment, it must be shown either that the act was purely wanton or that it was not performed in furtherance of any duty within the actual scope of the servant's authority. *Rhinesmith v. Erie Railroad Co.*, 76 N. J. L. 783.

In cases where the scope of authority of a servant or agent depends upon disputed matters of fact, the extent of such authority is ordinarily a question for the jury. *Dierkes v. Hauxhurst Land Co.*, 80 N. J. L. 369.

There was also evidence of ratification in defendant's treatment of the plaintiff a few days after the extraction, and continuing to treat him and advising an operation. The father testified that he paid Dr. Snively on both occasions, when teeth were extracted, and when defendant was asked if he received the money which was paid to Dr. Snively, he said, "I don't remember." Being asked again, "You don't know?" he answered, "No, sir."

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If, after denial of a motion for nonsuit, for failure of proof, the defect was supplied in the evidence afterwards adduced, the error of refusal will not lead to a reversal. *Esler v. Camden, &c., Railway Co.*, 71 N. J. L. 180.

As to the second assignment of error there was abundant proof from which the jury might find that the necrosis resulted from the negligent manner in which Snively treated the plaintiff. That disease, according to the testimony, may result from certain causes, one of them being a fracture of the jaw. Dr. Epstein, in his testimony, excluded all other causes except the possible one of abscess, and Dr. Snively excludes that by testifying that there was no abscess at the time he extracted the tooth, and the jury was justified in finding that all other causes, except the fracture, had been excluded.

A dentist is not an insurer of results; he is not answerable for infection, or results which follow the extraction of teeth, provided he has used due skill and care in the extraction and subsequent treatment. In offering his services to the public he impliedly contracts that he possesses and will use in the treatment of his patients a reasonable degree of skill and learning, and that he will exercise reasonable care, and exert his best judgment, to bring about good results. A failure to perform his duty renders him liable for injuries caused thereby. The standard of the degree of care, skill and diligence required of dentists is not the highest order of qualification obtainable, but is that degree of care, skill and diligence which are ordinarily possessed by the average of the members of the profession in good standing.

The evidence shows that the boy's lower left jaw bone was fractured about the point of the second bicuspid tooth. There was testimony from which the jury might find that this fracture was caused by the drawing of the tooth by Dr. Snively, and it is admitted by almost all the dentists who testified, including the defendant himself, that if sufficient force was used by the dentist at the time of the extraction of this tooth to cause a fracture, he did not act with reasonable skill, with ordinary skill and care, in the extraction of this tooth, and if he did not act with reasonable and ordinary skill and care

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in the extraction and treatment of the tooth, he was negligent, and the defendant is responsible for this act.

As to the third assignment of error this court will not consider the question of excessive damages on appeal from a judgment at law.

We can only review matters of law as presented by the record.

A writ of error brings for review before the higher court the judgments of inferior tribunals upon matters of law only. *Delaware, &c., Railroad Co. v. Newark*, 63 N. J. L. 310.

As to the fourth assignment of error there was proof that when Dr. Snively extracted a deciduous molar tooth from the plaintiff's lower left jaw on January 20th, 1914, it gave instant relief to the aching tooth; when he extracted the second tooth, adjoining the former, on January 29th, 1914, it gave no relief to the pain. The dentist used a forceps, and when the father remarked that the tooth came out very easily, he replied, "It did not come out as easy as you think it did." The boy continued to cry and complained of great pain; he did not sleep that night, and for several nights, and he was frequently taken to the office of Dr. Betts, the defendant, and to various physicians, until it was decided to perform the operation of scraping the bone for a condition of necrosis, which Dr. Betts says he thought was present. When that operation of scraping the bone was performed by Dr. Epstein, he says that he then discovered that the boy's jaw was fractured. Previous to that time he had found *crepitus*. The testimony on the part of the plaintiff is that he had no other injury around that time which might have caused the fracture of this bone. The fracture was on the lower left jaw bone just about the point of the second bicuspid tooth. Dr. Epstein testified that assuming that the second and third tooth from the rear on the left lower jaw of the plaintiff had been extracted prior to his seeing him, the one nearest the end on January 20th, 1914, from which no result of pain or discomfort followed, and the second extraction of the third tooth on January 29th, 1914, followed by incessant pain and suffering

on the part of the patient, such a condition could be brought about through a fractured jaw, and that the conditions as he found them to exist in the boy's jaw could have been produced by the extraction of a tooth on January 29th, 1914; that there must have been some violence which caused the fracture of the jaw bone; there was no way to tell whether this violence which caused the fracture was applied from within or without, only that there was no external mark of violence; as a rule, there is contusion or discoloration, or swelling on the outside; the swelling was all on the alveolar process of the jaw; that in the extraction of a tooth there would be no visible outward evidence of the use of force or violence; that he made inquiry as to whether the boy had received a blow from anybody or had fallen, and took a full history of the boy's case and found nothing of that sort.

Dr. Doremus testified that a broken jaw bone could ensue from taking out a first deciduous molar if there had not been due care; that it was possible in the extraction of a first tooth, first molar, of a child ten years of age, to fracture the jaw bone, and explained that "the temporary tooth has roots on it; the permanent tooth which is beneath it is imbedded between the roots of the temporary tooth; if you do not gently loosen that tooth in the extraction, you get, possibly, half an inch of leverage which, at the end of that half inch is greatly multiplied, correspondingly with the power which is placed on the end that is not in the mouth, and thereby you could fracture the jaw," and that pressure is exerted against the temporary tooth and the permanent as well, and through that tooth against the jaw.

In addition to the testimony of Dr. Snively a number of dentists testified that, in their opinion, a deciduous molar, which it is admitted it was, in a boy ten years of age, would have no roots; and that, even though the roots have not been entirely absorbed, some of them say it would have been impossible for the dentist to have used such force in its extraction as to cause a fracture. The proofs show that there was a fracture of the jaw bone, and defendant claims that there was

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no proof that the fracture resulted from any act on the part of Dr. Snively.

It was for the jury to say whether or not the inferences to be drawn from the facts lead to a conclusion that the fracture was caused by the extraction of the tooth.

As a general rule, if there is any evidence which, standing alone or considered apart from opposing evidence, is, if believed by the jury, legally sufficient, or might reasonably tend to support the verdict, though such evidence may not be of an entirely certain and satisfactory nature, it will not be disturbed. For, upon the mere weight of evidence, the jury are the judges. Inferences of fact are to be deduced by the jury, and whenever there is evidence from which an existence of facts sufficient to support a verdict might have been inferred, the verdict will not be disturbed. 3 Cyc. 348.

We are of the opinion that there was sufficient evidence to submit to the jury that the relation of master and servant existed between the defendant and Dr. Snively at the time of the extraction of the tooth by him on January 29th, 1914, and that the fracture of the plaintiff's jaw bone resulted from the negligent act of Dr. Snively in extracting the tooth, and that the motions for a nonsuit and to direct a verdict for defendant were therefore properly refused.

In every case where the issue depends upon the determination of facts, the existence of which is not admitted, the jury, not the court, must determine them. *Schmidt v. Marconi Wireless Telegraph Co. of America*, 86 N. J. L. 183.

A trial judge is only justified in granting a nonsuit or directing a verdict upon a court question arising from the admitted or uncontroverted facts of a case, and the weight of conflicting testimony should always be submitted to a jury for their consideration and determination. *Dickinson v. Erie Railroad Co.*, 85 N. J. L. 586; *Fulton v. Grieb Rubber Co.*, 72 Id. 35; *Clark v. Public Service Electric Co.*, 86 Id. 144, 151; *Tilton v. Pennsylvania Railroad Co.*, Id. 709; *DeVincenzo v. John Sommer Faucet Co.*, 87 Id. 645.

The judgment under review will be affirmed, with costs.

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For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 15.

For reversal—None.

DAYTON BLACKFORD, RESPONDENT, v. HARRY B. GREEN
ET AL., APPELLANTS.

Submitted December 6, 1915—Decided June 19, 1916.

On appeal from the Supreme Court, whose opinion is reported in 87 N. J. L. 359.

For the respondent, *Elmer L. McKirgan*.

For the appellants, *Elmer W. Romine*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, MINTURN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 11.

For reversal—None.

Blake v. Pleasantville.89 N. J. L.

MARK W. BLAKE, APPELLANT, v. CITY OF PLEASANTVILLE AND THE RODNEY HOTEL COMPANY, RESPONDENTS.

Argued November 29, 1915—Decided June 19, 1916.

On appeal from the Supreme Court, whose opinion is reported in 87 N. J. L. 426.

For the appellant, *Babcock & Champion*.

For the respondents, *Elwood C. Weeks*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Kalisch in the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, MINTURN, TERHUNE, HEPPENHEIMER, JJ. 8.

For reversal—BLACK, WILLIAMS, TAYLOR, JJ. 3.

MARK W. BLAKE, APPELLANT, v. CITY OF PLEASANTVILLE AND THE RODNEY HOTEL COMPANY, RESPONDENTS.

Argued November 29, 1915—Decided June 19, 1916.

On appeal from the Supreme Court, whose opinion is reported in 87 N. J. L. 426.

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For the appellant, *Babcock & Champion*.

For the respondents, *Elwood C. Weeks*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Kalisch in the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, MINTURN, BLACK, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 11.

For reversal—None.

MARY FEENEY, RELATOR-APPELLANT, v. GEORGE H. BURKE ET AL., COMPRISING THE BOARD OF CIVIL SERVICE COMMISSIONERS, RESPONDENTS.

Argued March 14, 1916—Decided June 19, 1916.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

“The facts and the question involved are thus stated in the brief of counsel for the rule.

“Jersey City has adopted the provisions of the so-called ‘Walsh act,’ chapter 221, laws of 1911. The present members of the board of commissioners of that city were elected on the 10th day of June, 1913, and were organized under said act on the 17th day of June aforesaid. On the day last mentioned George F. Brensinger, one of the members of the said board, was elected or appointed by the said board of com-

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missioners to be director of revenue and finance, and at the same time was elected or appointed by the said board treasurer of Jersey City, comptroller of Jersey City and city collector of Jersey City. Subsequently, the said George F. Brensinger appointed one Joseph F. S. Fitzpatrick to be his private secretary, and the said Fitzpatrick has ever since and still is such private secretary to the said Brensinger as director of revenue and finance. Subsequently, on the 29th day of October, in the year 1914, the said board, declaring that there was necessity for a confidential stenographer to the said Brensinger as city comptroller, appointed the relator such stenographer. The city clerk of Jersey City certified such last-mentioned appointment to the board of civil service commissioners. The civil service commissioners declined to consider the said relator as being in the exempt class under the provisions of the so-called Civil Service law. *Pamph. L. 1908, p. 235.* The said civil service board has also refused to certify the name of the said relator for payment as provided for in the twenty-sixth section of the said Civil Service act, and it is under this twenty-sixth section that she now makes her application for a writ as authorized and directed therein.

"The theory of the relator is that her appointment is valid, and that she is entitled to payment as an appointee coming within the fourth subdivision of the thirteenth section of the Civil Service act as a stenographer to a principal executive officer, to wit, the comptroller of Jersey City.

"The statute provides that one private secretary, or clerk, or stenographer of such principal executive officer shall be included in the exempt class. We think the treasurer, comptroller and collector of Jersey City are not principal executive officers. Section 4 of the Commission Government act expressly enacts that the board of commissioners shall have and possess all administrative, judicial and legislative powers now had and possessed and exercised by the mayor and city council and all other executive or legislative bodies in the city and have complete control over the affairs of the city. If this office of comptroller can be said to exist still, he is obviously

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a mere employe of the commissioners and no longer a principal executive officer.

"The rule must be discharged, with costs."

For the appellant, *John Bentley*.

For the respondent, *John W. Wescott*, attorney-general.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, MINTURN, BLACK, TERHUNE, HEPPEHEIMER, WILLIAMS, TAYLOR, JJ. 11.

For reversal—None.

CONSTANTINE GRYBOWSKI, ADMINISTRATRIX, RESPONDENT, v. ERIE RAILROAD COMPANY, APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 1.

For the respondent, *Frank M. Hardenbrook*.

For the appellant, *Collins & Corbin*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Chief Justice Gummere in the Supreme Court.

Trustees of Hoboken Cemetery v. Hoboken. 89 N. J. L.

For affirmance—THE CHANCELLOR, SWAYZE, TRENCHARD, PARKER, BERGEN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

BOARD OF TRUSTEES OF HOBOKEN CEMETERY, RESPONDENT, v. MAYOR, &c., OF HOBOKEN, APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 111.

For the respondent, *Edward J. D. Stover*.

For the appellant, *John J. Fallon*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Minturn in the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

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JAMES KYSE, PLAINTIFF-RESPONDENT, v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, DEFENDANT-APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

"The plaintiff was a passenger on defendant's train, and had his hand injured by the closing of the car door for which he recovered a verdict of \$350, and defendant appeals. The errors specified are refusal to nonsuit and to direct verdict for defendant.

"From the evidence the jury might infer that plaintiff left his seat in the car as it was running into the station at Chat-ham for the purpose of alighting; that he opened the door and pushed it over the catch put there for the purpose of holding it; that at this time the car gave a sudden jerk or lurch of sufficient force to throw plaintiff forward, and un-loose the door from the catch; that to save himself from being forced to the platform of the car, he grabbed the door jamb and his fingers were caught by the door and injured; we think that if a slowly-moving car about to stop is sud-denly given such a jerk as to throw a passenger forward so that he is compelled to grasp the door jamb to save himself from falling, and the force is sufficient to unloose a car door from a catch supposed to hold it in place in the ordinary operation of a train, a jury might properly infer negligent operation.

"The judgment will be affirmed."

For the appellant, *Frederic B. Scott*.

For the respondent, *David F. Barkman*.

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PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

HOWARD W. MILLER, PLAINTIFF-RESPONDENT. v. I. P.
THOMAS & SON COMPANY, DEFENDANT-APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

“This was an action to recover for damages done to the growing crops on the plaintiff’s farm by the noxious gases and vapors emitted from the factory of the defendant. There was a verdict for the plaintiff and judgment thereon.

“The first ground assigned for reversal is that the court refused to charge the following request: ‘The injury must be clear, direct and positive. It must be the legitimate and natural result of the nuisance charged and in no essential degree the result of other artificial causes. If the injury is in part the result of other causes, the action must fail, unless it be clearly established that the injury would not have resulted except for the vapors. So, too, the injury must be of a tangible character. It must be a sensible injury, discernible to an ordinary person, and nowise dependent upon scientific tests or microscopic examinations to discover. The injury must be such as is apparent to the eye in its ordinary

condition, and must be actual and substantial, and not contingent, prospective or remote, and must be clearly traceable to the nuisance charged. If there is a reasonable doubt as to the cause of the injury, the benefit of the doubt will be given to the defendant if his trade is a lawful one, and the injury is not the necessary and natural consequence of the act, as in all actions of this nature the burden of proof is upon the plaintiff.'

"The legal impropriety of this request is apparent. It involves a series of unconnected legal principles, some of which were applicable to the case, and some of which were not. That part of it which asserts that the defendant is entitled to the benefit of a reasonable doubt as to the cause of the injury means, as we understand it, that the plaintiff was bound to prove his case beyond a reasonable doubt in order to recover. This we conceive not to be the law in cases of this character. Moreover, all of the propositions contained in this request which were sound, and which had any relevancy to the case as made before the jury, were charged by the trial court.

"It is further contended that the court erred in admitting testimony of the emission of noxious fumes and gases on dates other than those specifically set forth in the complaint. The complaint alleged that the defendant on the 21st day of May, 1909, and on other specified dates in that month, in the month of June, the month of July of that year, and on other specified dates in the month of May, 1911, 'and on divers other days and times between the first date aforesaid and the commencement of the suit,' caused these noxious fumes and gases to be emitted to the damage of the plaintiff. All of the testimony admitted was confined within the period between May 21st, 1909, and the beginning of the suit, and was properly received.

"Lastly, it is asserted that it was improper for the court to permit the plaintiff's counsel, on the cross-examination of one Albertson, a witness produced by the defendant, to ask him whether he had ever collected anything from the defendant company for damages that their fumes and gases had done to

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his crops. The argument is that this raised a harmful issue entirely immaterial to the issue set forth in the pleadings. But counsel seems to have overlooked the fact that the witness had already testified on his direct examination that the fumes and vapors coming from defendant's factory across his orchard were not at all injurious to his crops, or to the trees that bore them. The cross-examination was manifestly competent as tending to discredit this testimony.

"The judgment under review will be affirmed."

For the defendant-appellant, *Gaskill & Gaskill*.

For the plaintiff-respondent, *John Boyd Avis*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

KARL F. RAEUBER, PLAINTIFF-APPELLANT, v. PUBLIC SERVICE RAILWAY COMPANY, DEFENDANT-RESPONDENT.

Submitted March 27, 1916—Decided June 19, 1916.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

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"This was an action for personal injuries received by the plaintiff while alighting from a car of the defendant company, in the city of Camden. The plaintiff had a verdict and judgment. The defendant appeals.

"Plaintiff's case was that, being a passenger on the defendant's car, and desiring to leave the car at Eighth street, he advised the conductor of his wish; that upon arriving at Seventh street, he again told the conductor to let him off at Eighth, and the conductor gave the necessary signal to the motorman; that after the signal was given he (the plaintiff) went out on the platform; that the car slacked up; that he stepped onto the step; and that just at that moment the car gave a jerk which threw him into the street.

"We think this judgment cannot be sustained. There is no proof that the jerk of which plaintiff complains was abnormal, or anything more than was merely incidental to the proper operation of the car. Consequently, no negligence was shown which rendered the defendant company responsible for plaintiff's injury. The plaintiff, in taking his position upon the step, assumed the risk of accident which might result from normal operation, and had only himself to blame for the injuries which he received.

"It is true that the motorman testified that there was no observable jerk after he began to slow down the car. But, conceding that the jury had a right to disbelieve this statement, the nullifying of his testimony will not supply the evidence which the plaintiff was bound to produce, namely, evidence showing abnormality in the operation of the car.

"The judgment under review will be reversed."

For the plaintiff-appellant, *Stackhouse & Kramer*.

For the defendant-respondent, *Lefferts S. Hoffman*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

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For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, BLACK, WHITE, TERHUNE, HEPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—KALISCH, J. 1.

SARA R. REID, APPELLANT, v. SAMUEL DUBLIER ET UX.,
RESPONDENTS.

Submitted December 15, 1915—Decided June 19, 1916.

On appeal from the Supreme Court, whose opinion is reported in 87 N. J. L. 115.

For the appellant, *Treacy & Milton*.

For the respondents, *Heyman & Heyman*.

PER CURIAM.

The judgment of the Supreme Court is affirmed, for the reasons given in the opinion delivered in that court with two slight modifications.

1. The reference in the opinion to Imbriglio, the mortgagee, as the agent of the trust company, his assignee in the collection of the quarterly installments, was not essential to the decision reached by the court and could not properly be made the basis of such decision, in view of the absence of a finding by the District Court that Imbriglio was such agent.

2. The decision that the defendant did not receive constructive notice of the assignment of the bond and mortgage to the plaintiff by its being recorded on January 13th, 1911, should be amplified by introducing into the facts on which such decision is based the further circumstance that the assignment to the trust company recorded on July 18th, 1910,

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was of the bond and mortgage with a covenant to reassign the same upon the payment of \$2,000 with interest.

The argument, then, is that this record was constructive notice of the assignment to the trust company, and that unless or until the mortgagor had notice, actual or constructive, of a reassignment by the trust company to Imbriglio, it was not charged with record notice of a later assignment made by him. As a fact the trust company never reassigned to Imbriglio, whose assignment made on January 13th, 1911, to the plaintiff when he was not the record owner, while effective as between the parties, was ineffective as the basis of record notice to the mortgagor.

It is also worthy of note that the plaintiff obtained the assignment of the bond and mortgage from the trust company August 20th, 1912, by paying to it the balance of the \$2,000 and interest due from the defendant. Such balance was the difference between the debt and the installments that had been paid thereon by the mortgagor, all of which had been paid to Imbriglio. It was incumbent upon the plaintiff therefore to overcome the presumption that she got the benefit of the payment of January 15th, 1911, made by the mortgagor to Imbriglio; otherwise, so far as her case shows, she is suing to recover an installment of which she got the benefit by the reduction to that extent of the balance claimed by the trust company when she secured the assignment of the bond and mortgage from it.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, MINTURN, BLACK, WHITE, HEPPELHEIMER, WILLIAMS, TAYLOR, JJ. 11.

For reversal—None.

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Salerno v. Passaic.89 N. J. L.

LOUIS SALERNO, RESPONDENT, v. CITY OF PASSAIC, APPELLANT.

Submitted March 27, 1916—Decided June 19, 1916.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 87.

For the respondent, *Andrew Foulds, Jr.*, and *William B. Davidson*.

For the appellant, *Albert O. Miller, Jr.*

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Parker in the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, MINTURN, BLACK, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

THE STATE OF NEW JERSEY, DEFENDANT IN ERROR, v. MARGARET BEAVERS, PLAINTIFF IN ERROR.

Submitted March 27, 1916—Decided June 19, 1916.

On error to the Supreme Court, in which the following *per curiam* was filed:

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State v. Beavers.

"Defendant was convicted of keeping disorderly house and brings error, assigning following reasons:

"1. No evidence to sustain the charges.

"This is not true, the evidence is ample.

"2. No evidence that defendant had knowledge of or power to suppress the acts constituting the crime. The proof is that she was present taking the money for the illegal use of rooms.

"3. That the witness Rosenberg was allowed to testify to a conversation with a girl he was taking to the defendant's house. To this there was no exception taken nor action by the court.

"4. Error in charging jury that knowledge of disorderly place may be brought to the accused by evidence showing a course of conduct from which it may be inferred. This is not error. The assignments are without merit.

"Judgment will be affirmed."

For the plaintiff in error, *Frank M. McDermit*.

For the defendant in error, *Frederick F. Guild*, prosecutor of the pleas, and *Wilbur A. Mott*, assistant prosecutor of the pleas.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, TERHUNE, HEPPEHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

THE STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
DAVID PETERS, PLAINTIFF IN ERROR.

Submitted December 6, 1915—Decided June 19, 1916.

On error to the Supreme Court, in which the following *per curiam* was filed:

"The defendant was indicted for and convicted of assault in shooting at children who invaded his yard; and the case is here on the entire record.

"It is urged that the testimony adduced by the state does not support the verdict. We think there was testimony *pro* and *con* upon the facts, and the jury were entitled to draw such inferences as they thought were justifiable from the testimony, the circumstances and the conduct of the parties. There was enough in the testimony to warrant the conviction if the jury believed the testimony upon the part of the state.

"We think the comments of the learned trial court upon the testimony were not improper, and were entirely within the sphere of judicial comment, and in nowise prejudicial to defendant. The reference made by the court to the interest of the witnesses was in accordance with the recognized rules of evidence, and was not improper.

"The reply made by the learned trial court to the inquiry in writing submitted by the jury, viz., whether it was possible to convict and recommend to the leniency of the court, was not an improper response and was in accord with the usage and settled practice of the courts in such a situation.

"We are unable to perceive, however, in what aspect the reply of the learned trial court could have injured the defendant.

"The conviction will be affirmed."

For the plaintiff in error, *McDermitt & McDermitt*.

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For the defendant in error, *Frederick F. Guild*, prosecutor of the pleas.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, SWAYZE, TRENCHARD, PARKER, BERGEN, KALISCH, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 12.

For reversal—None.

BOROUGH OF VERONA ET AL., APPELLANTS, v. BOARD OF
CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX
ET AL., RESPONDENTS.

Submitted March 27, 1916—Decided June 19, 1916.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 55.

For the appellants, *Borden D. Whiting*.

For the respondents, *Harold A. Miller* and *Robert M. Boyd, Jr.*

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court.

Verona v. Freeholders of Essex.89 N. J. L.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, MINTURN, BLACK, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

CASES DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW JERSEY.

NOVEMBER TERM, 1916.

ALEXANDER BOUNDS v. TOWNSHIP OF CHESTER IN THE
COUNTY OF BURLINGTON.

Submitted July 6, 1916—Decided November 11, 1916.

Where the proceedings to make a tax a lien on lands are defective, a writ of *certiorari* to review a sale of the land to enforce the lien will be allowed although the eighteen months' period for reviewing the sale have expired, as the only sales to which this limitation applies are sales to enforce a statutory lien, that is, one valid in law.

On *certiorari* of tax sale.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *George B. Evans*.

For the township, *John D. McMullin*.

For Juli F. Hock, *John Francis Cahill*.

Bounds v. Chester Township.89 N. J. L.

The opinion of the court was delivered by

SWAYZE, J. The prosecutor seeks to set aside a certificate of sale for taxes. The taxes were for the year 1908; the sale was in September, 1909; the certificate is dated and acknowledged September 25th, 1909, and was recorded November 13th, 1909. The prosecutor's writ was allowed January 14th, 1916, and he is met by the objection that it was too late. The act of 1915 enacts that no writ of *certiorari* shall be allowed to review any sale of land to enforce any tax unless allowed within eighteen months from the date of sale. The statute by its very terms applies only to sales of land to enforce a tax. The only sales of land to enforce a tax authorized by our legislation are in cases where the tax has been by proper proceedings made a lien on land. The only sales therefore to which the limitation on review by *certiorari* applies are sales to enforce a statutory lien. A sale to enforce a tax where there is no statutory lien would be without authority of law, and an attempt to take the taxpayer's property without due process of law, and such a sale could not be made effective by limiting the time within which a *certiorari* could issue. The case would then come within the rule of *Traphagen v. West Hoboken*, 39 N. J. L. 232; 40 *Id.* 193, and the cases that have followed it. The *certiorari* was properly allowed.

The objection made to the proceedings is that there was no return to the township clerk as required by section 54 of the Tax act. The importance of proceeding strictly in accordance with the act is shown by our decisions in *Jones v. Landis Township*, 50 N. J. L. 374, and *Landis v. Vineland*, 61 *Id.* 424, where sales were held invalid. The present Tax act differs from the one there under consideration, but the principles enunciated and the reasons given therefor are equally applicable to the present Tax act except so far as section 60 has introduced a modification. That section enacts that no sale shall be set aside because of the failure of the clerk to record the proceedings relative to the sale, if it shall appear by other legal evidence that the land sold was in fact

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that assessed, and that the sale was made pursuant to law. These facts are not shown in the pending case. The certificate of sale is invalid and must be set aside. Must it be upon terms? Section 60 provides that where the assessment itself is valid and the tax is justly due, no sale shall be set aside except on condition that the amount due shall be paid to the holder of the tax lien. By virtue of section 49, the tax lien passes with the title to the purchaser. The use of the words "pass with the title" is obviously inaccurate, since the title does not pass where the proceedings are defective, and the very next sentence in section 49 shows that the object of the provision for the passing of the tax lien was to secure the purchaser when the sale was set aside. It reads as follows: "Where such sale shall be set aside for defect in the proceedings to sell, the lien shall be thereby continued for one year after final action in the proceedings by which the sale was annulled." If therefore a tax lien had been filed in accordance with section 50, we would impose terms upon the prosecutor. In the absence of such a lien, the taxing district is required by section 60 to refund to the purchaser the price paid, since the sale is set aside because of defective proceedings on the part of the officers, and the purchaser must assign to the tax district the certificate of sale and all his interest in the tax and tax lien. In the situation of the case as presented to us, we can impose no terms, and must leave the township to its right, if it has any, to readvertise and sell if there is a tax lien and it remains in force.

Buohl v. Beverly.89 N. J. L.

CHARLES A. BUOHL v. BOARD OF COMMISSIONERS OF
THE CITY OF BEVERLY.

Argued July 10, 1916—Decided July 18, 1916.

When, in cities governed by a commission form of government under *Pamph. L. 1911, p. 462*, it is sought to have an ordinance passed under the provisions of that statute relative to the initiative, the procedure provided by the statute for petitioning for such ordinance must be strictly followed. The affidavit, verifying the signatures to the petition, must be distinct from the paper forming part of the petition; the affidavit must be made by one who has signed the petition; each signer must add to his signature his place of residence, giving the street and number; and the ordinance passed or submitted must be the identical one petitioned for, without alteration.

On rule to show cause for *mandamus*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the rule, *Stackhouse & Kramer*.

Opposed, *Ernest Watts* and *John G. Horner*.

The opinion of the court was delivered by

SWAYZE, J. This is an application for a *mandamus* to compel the commissioners of Beverly to submit to a vote of the people a proposed ordinance to establish an excise commission. The statute (*Pamph. L. 1911, p. 462*) requires that one of the signers of each paper constituting the petition shall make an oath that each signature to the paper appended is the genuine signature of the person whose name it purports to be. This language can only mean that the affidavit to which oath is required to be made shall be distinct from the paper forming part of the petition. Otherwise the words "paper appended" are without force. In the present case there are four papers, one of them containing seventy-eight names out of a total of one hundred and seventy-one, is verified only by the affidavit of one who did not sign the paper itself.

Without this paper there are not enough signatures to comply with the statute. This is fatal to the application.

As proceedings of this kind are unusual, this being the first that has come before us, we think it well to state other difficulties which ought to be avoided. The papers petition for the passage of an ordinance entitled "An ordinance to establish an excise department in the city of Beverly." No copy of the proposed ordinance is attached, nor is there anything to show that any ordinance was called to the attention of the petitioners. So far as appears the petition would be complied with by the passage of any ordinance, no matter what its contents might be, if only it was entitled as set forth in the petition. The fact that with the four papers constituting the petition, there was handed to the clerk a fifth paper containing a draft of an ordinance is immaterial. It is not shown that each petitioner saw and read that draft, or that it was the proposed ordinance each petitioned for. The legislature was careful to say that the ordinance petitioned for should either be passed without alteration or submitted to the people without alteration. The scheme of the act seems to require that the ordinance without alteration be recommended by the petitioners. This can only be done, as far as we can see, by showing that each petitioner knew the contents of the proposed ordinance and petitioned for that very ordinance without alteration. Perhaps a *prima facie* case would be made by attaching a copy of the proposed ordinance to each paper. We need not pass on these questions now and mention them in the hope that we may not hereafter be called to pass on difficulties that can readily be avoided.

There is another seeming defect. The statute requires that each signer shall add to his signature his place of residence, giving the street and number. It appears that most, if not all, of the streets of Beverly are named and many of them are numbered. Yet but few have given the numbers as the statute requires. This defect could have been easily avoided if the petitioners had taken the care that should be taken in the initial step of so important a matter as municipal legislation.

The application is denied, with costs.

Frank v. Nat. Alliance of Bill Posters.89 N. J. L. .

LOUIS FRANK v. NATIONAL ALLIANCE OF BILL POSTERS.

Submitted July 6, 1916—Decided November 9, 1916.

Courts of law will not interfere by *mandamus* to compel a voluntary unincorporated association to receive into their social relationships one who is personally disagreeable to them, whether for a good or a bad reason, when no property rights are involved.

On rule for a *mandamus*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the relator, *Thomas S. Henry*.For the defendants, *Joseph A. Beecher*.

The opinion of the court was delivered by

SWAYZE, J. The defendants are an unincorporated organization—a trade union. They are not shown to have any property and the plain question is whether the court will interfere by *mandamus* to compel the other members to receive the relator as a member. The question seems never to have been directly decided in this court. In *Zelliff v. Knights of Pythias*, 53 N. J. L. 536, the local lodge was unincorporated, and the case turned upon the necessity of the relator seeking redress in the tribunals of the order before having recourse to the civil courts. The suggestion of the court that after appealing to the highest tribunal within the order, he might still sue for relief and that the defendants would still be within reach of the mandatory writ, was not meant to be a decision that such writ would issue. The only authority cited was *Sibley v. Carteret Club*, 40 *Id.* 295, which was a case of a corporation, not a mere unincorporated association. The distinction between incorporated and unincorporated associations was pointed out by Vice Chancellor Emery in *O'Brien v. Musical Mutual P. & B. Union*, 64 N. J. Eq. 525 (at p. 532). He cites the English cases, *Forbes v. Eden*, L. R., 1 H. L.

Scotch App. 568 (*Lord Cranworth*) ; *Rigby v. Connol, L. R.*, 14 *Ch. Div.* 482 ; 49 *L. J. Ch.* 328 (*Jessel, M. R.*) ; *Baird v. Wells*, 44 *Ch. Div.* 661, 675 ; 59 *L. J. Ch.* 673 (*Stirling, J.*, appeal therefrom dismissed by consent). The reasons are well stated in the opinion by *Jessel*: "The courts as such never dream of enforcing what I may call personal agreements, that is, agreements strictly personal in their nature, whether they are agreements of hiring and service, whether they are agreements of master and servant, or whether they are agreements for the purpose of pleasure or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy. No court of justice can interfere, so long as there is no property the right to which is taken away from the person complaining." He instances the case of a number of gentlemen meeting at each other's houses to play cards ; or a number of scientific men meeting from time to time by agreement for scientific purposes. A like view was expressed by Vice Chancellor *Green* in *Mayer v. Journeymen Stonecutters' Association*, 47 *N. J. Eq.* 519, although the question there involved was different ; two of the complainants who had never been members of the association sought to force an entrance with the aid of the court.

It would be quite impracticable for the courts to undertake to compel men to receive into their social relationships one who was personally disagreeable whether for a good or a bad reason. Property rights the courts can deal with ; rights in an incorporated company are of that character, and the right of membership is ordinarily assignable. Voluntary associations are quite different. The courts can deal with property rights of such associations, if there are any, while they cannot by a mandatory writ intrude one man's companionship on another. The attempt to do so would be unavailing as it would lead only to the disintegration of the association. We do not mean to deny the present relator's right to recover damages if his right to labor has been illegally interfered with. *Brennan v. United Hatters*, 73 *N. J. L.* 729. All we now decide is that *mandamus* is not a proper remedy. The rule is discharged, with costs.

In re Board of Election.89 N. J. L.

IN THE MATTER OF APPLICATION FOR MANDAMUS ON
BOARD OF ELECTION, FOURTEENTH DISTRICT,
TWELFTH WARD OF JERSEY CITY.

Argued November 27, 1916—Decided December 1, 1916.

Under the provisions of the act regulating elections, the board of county canvassers ordinarily is required to canvass the returns as laid before them by the various local boards, but where a doubt appears from the return as to its correctness, it is proper to have the local board certify what are the correct figures.

Before Justices SWAYZE and KALISCH.

For the relator, *George J. McEwan*.

Opposed, *Gilbert Collins*.

The opinion of the court was delivered by

SWAYZE, J. Ordinarily we think the board of county canvassers would be required to canvass the returns laid before them, and could not seek for evidence elsewhere. *State, Gledhill v. The Governor*, 25 N. J. L. 331. But this rule can only be applicable when the return laid before them is fair and unambiguous on its face and made in conformity with the statute. Where, as in this case, the return as made suggests a doubt as to its own correctness, the board of canvassers, if its canvass is to be anything more than a mere mechanical tabulation of figures, must of necessity ascertain the true state of the case. Otherwise the present deadlock in that board might well continue in spite of our writ requiring them to proceed. They naturally sought information in the duplicate return and while the fact that the duplicate was unambiguous in crediting the relator with one hundred and sixty votes would naturally lead candid men to the belief that one hundred and sixty was the correct figure, we cannot censure the members of the county board who still remained

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unsatisfied. The proper way to satisfy them is to have a return by the local board which shall certify whether the correct figure is one hundred and twenty-five or one hundred and sixty. Inasmuch as the evidence taken on the rule satisfied both parties that the latter was correct, we see no objection to a *mandamus* issuing to the local board. The effect will be to secure the relator his rights and save the great expense of a recount which would probably fall on the county, for if the relator was credited with one hundred and twenty-five votes only, he would start the recount with an assurance that an error of thirty-five had been made against him which the recount would correct.

Let a peremptory *mandamus* issue.

LEONARD MORELAND, PROSECUTOR, v. LENA ABBOTT
STEEN, RESPONDENT.

Submitted July 6, 1916—Decided November 10, 1916.

1. Upon a *certiorari* to review a judgment of a District Court summarily dispossessing a tenant, the only question to be considered is whether the District Court had jurisdiction, and in considering this question the Supreme Court cannot review the findings of facts, but can only determine whether there was any evidence from which the jurisdictional facts might have been found.
2. The statute relating to tax sales (*Comp. Stat.*, p. 5135, pl. 56) gives the holder of the certificate of sale the right to immediate possession of the property and to the rents and profits from the date of the certificate, but this does not prevent the landlord from bringing proceedings to dispossess the tenant for non-payment of rent accrued previous to the making of the tax certificate.
3. Judgment of dispossession in such case might result in turning the tenant out of possession, while the purchaser at the tax sale, who was not a party to the proceeding, would be entitled to possession rather than the landlord, but this difficulty can be met by controlling the writ of possession.

On *certiorari* to the Paterson District Court.

Moreland v. Steen.89 N. J. L.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Philip J. Schotland*.

For the respondent, *James F. Carroll*.

The opinion of the court was delivered by

SWAYZE, J. The *certiorari* in this case brings up summary proceedings to dispossess a tenant. The only question therefore before us is whether the District Court had jurisdiction. No objection is made to the affidavit on which the proceedings were based. The objection is to the proof at the trial. In view of the limitation upon our power of review in cases of this character, the question is within very narrow limits. We cannot review the findings of fact by the trial judge; we can only determine whether there was any evidence from which he might have found the existence of the jurisdictional facts. No evidence is before us except a certificate of sale for taxes, and there is no finding of facts or agreed state of the case. The docket shows that the landlord's agent gave testimony and that the agreement was offered in evidence. We must therefore assume that the facts set forth in the landlord's affidavit were proved; otherwise the tenant would have moved to dismiss, and the District Court would not have proceeded to render judgment in favor of the plaintiff for possession. This situation makes a *prima facie* case of jurisdiction and we must dismiss the *certiorari* unless evidence was introduced by the defendant of some new fact which demonstrates the want of jurisdiction. The defendant relies on the certificate of the tax sale. This certificate was made February 6th, 1915, and recorded as a mortgage April 6th, 1915. The statute (*Comp. Stat.*, p. 5135, pl. 56) gives the holder of the certificate of sale the right to the immediate possession of the property and to the rents and profits from and after the date of the certificate. Apparently the prosecutor thinks it is conclusive against the landlord's claim that there was default in the payment of the rent, and as failure to prove this default would be a failure to prove a jurisdic-

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tional fact, he claims that the judgment should be reversed. This is not so. The landlord alleged default in every month's rent beginning July 1st, 1914, and the District Court must have found there was such default since it retained jurisdiction of the cause. Payments to the purchaser at the tax sale might have been proper after February 6th, 1915, but this does not deprive the District Court of jurisdiction to proceed for the already existing default. It is possible that the result would be to turn the tenant out of possession while the purchaser at the tax sale, not a party to the proceedings, would be entitled to possession rather than the landlord. This difficulty is not a new one. We called attention to it in *Brahm v. Jersey City Forge Co.*, 38 N. J. L. 74, 80. The remedy is not by refusing to proceed to judgment, but by controlling the writ of possession in a proper case. In the present case it is not even suggested that the purchaser at the tax sale sought for any relief. Since the District Court had jurisdiction, the writ must be dismissed, with costs.

JAMES D. MORIARTY v. BOARD OF COMMISSIONERS OF
THE CITY OF ORANGE.

Submitted July 10, 1916—Decided August 14, 1916.

The city of O. contracted with M. for the removal of garbage and ashes for four years, and provided that if the contractor after due notice and hearing should be found guilty of a violation of specifications and conditions, the city should be entitled to \$50 for each violation as liquidated damages; and further, that if the work was not performed satisfactorily to the board of commissioners, they might terminate the agreement by resolution; and that the contractor and his surety should then be compelled to pay the cost to the city of finishing the work for the unexpired time. The city terminated the agreement by resolution, of which the contractor had notice, and made a contract with another concern for the removal of garbage and ashes. *Held*, that the resolution was not within the provisions of section 6 of the Commission Government act (*Pamph. L. 1912, p.*

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649), which is intended only to apply to original contracts, and not mere subsidiary contracts provided for by the terms of the original contract, as in this instance. *Held, also*, that it was legal to insert in the contract a provision for its termination, even if the statute did not, in express language, authorize such a provision, as details must be left to the municipality. *Held, further*, that prosecutor was not entitled to be heard before the passage of the resolution terminating the contract, no such requirement being inserted in the contract.

On certiorari.

The city of Orange contracted with Moriarty for the removal of ashes and garbage for four years from August 20th, 1914. The contract provided that if after hearing on due notice, Moriarty should be found guilty by the board of commissioners of a violation of the specifications and conditions, the city should be entitled for each violation to \$50 as liquidated damages. It was further agreed that if the work was not performed satisfactorily to the board of commissioners, they might by resolution terminate the agreement by mailing a certified copy of the resolution to the last post-office address of Moriarty, and that he and his surety should then be compelled to pay whatever the city should be compelled to lay out to finish the work for the unexpired period of the agreement and make good any damages the city should suffer by reason of the breach. This further provision omits any requirement of notice to Moriarty such as is contained in the clause above set forth. In March and April, 1916, Moriarty pleaded guilty to two separate charges of violation of the contract, the last of which was on April 15th, and was fined \$50 for each violation. On May 9th, a resolution was adopted setting forth that the work was not being performed satisfactorily to the board and the contract was terminated from and after May 11th. Moriarty's counsel were present and suggested that if the city terminated the contract, the bonding company be given a chance to take over the contract, but no action was taken on this request. It is not questioned that Moriarty had such notice of this resolution as the contract required. On May 10th, a contract was made with the

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Maloney Contracting Company for removal of garbage, ashes and house refuse for a period beginning May 12th, 1916, for \$70 per working day. This contract was terminable on five days' notice. On June 3d the present writ was allowed removing for review by this court the proceedings at the meeting of May 9th.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *George W. Anderson* and *Frank E. Bradner*.

For the defendants, *Arthur B. Seymour*.

The opinion of the court was delivered by

SWAYZE, J. We think the resolution is not such as is contemplated by section 6 of the Commission Government act. *Pamph. L. 1912, p. 649*. So far as the resolution merely terminates Moriarty's contract, it is not even within the words of section 6; so far as it authorizes the making of a contract, the act is intended only to reach original contracts and not to include merely subsidiary contracts that are already provided for by the terms of contracts duly made. In the present case, the original contract with Moriarty, the validity of which is not questioned, provided that he and his surety should be compelled to pay whatever the city was compelled to lay out to finish the work. The subcontract necessary for that purpose was impliedly authorized by the duly adopted principal contract with Moriarty. We think nothing more was necessary. If we were wrong in this, the prosecutor would not be entitled to relief, since on the prosecutor's view the resolution cannot be held to have been finally adopted, and would be merely the form in which it was proposed to be finally adopted. The statute evidently contemplates two proceedings—*first*, the completion of the form in which the ordinance or resolution must be finally passed; *second*, the final passage or adoption at least two weeks thereafter. It is only on this supposition that the word "final" in the act can

be given a sensible meaning. The reason underlying the act seems obvious. The provision was meant to insure against haste or trickery in municipal legislation. To that end, the public were to have two weeks to examine the proposed resolution or ordinance, and it was not subject to amendment. Since the present resolution was not finally passed within the meaning of the statute, the prosecutor could not be injured, even on his own view. He would have the right to go on doing the work as he has done, and the city would be obligated to pay him. The prosecutor as taxpayer could not be injured since the city would owe nothing to the Maloney company for work done before the resolution was finally adopted. The result would then be a dismissal of the writ as prematurely allowed. But for the reason we have before stated, we think the resolution became effective at once, and we proceed to the other objections raised by the prosecutor.

It was legal to insert in the contract the provision for its termination. The argument that no such provision is authorized by the statute is beside the point. It may be extra-statutory, but that is very different from being illegal. It would be intolerable if the legislature were required to authorize specifically every provision and specification of every municipal contract. The details must be left to the municipality, as in fact they always have been. The suggestion that the right to terminate a contract opens the door for the evasion of competitive bidding is without force. The fact that a provision which is intended to protect the rights of the city by securing prompt and exact performance on the part of the contractor, adds to the power of the municipality, is far from being against public policy; it is quite in accordance therewith. If in fact the provision is perverted for the purpose of evading the requirement of competitive bidding, the court can readily correct the evil by setting aside the fraudulent contract. There is no suggestion of fraud in this case.

It is hardly necessary to deal with the suggestion that there should have been unanimous action by the board. In this

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case as in others, the act of a majority at a meeting of the board duly held, is the act of the board.

That the prosecutor was not entitled to be heard in such a case is settled in this court. *Miller v. Atlantic City*, 74 N. J. L. 345. The contract with Moriarty itself makes a distinction by requiring due notice to him when it is sought to impose the \$50 for damages and omitting that requirement in the clause authorizing the termination of the contract.

That the city had not only its remedy by exacting the \$50 for liquidated damages, but also its remedy by terminating the contract is clear. The damages are for actual violation of contract; the termination is authorized as a remedy for unsatisfactory performance. Violation of the contract may justify the board of commissioners in their dissatisfaction, but performance that may well be unsatisfactory may not go so far as to amount to violation. The contract contains the two clauses because each dealt with a different situation.

If the prosecutor was in fact misled by the mayor, it was his own fault. His mistake, or the conduct of the mayor could not bind the board. By the contract it was the board that was to be satisfied, not the mayor alone.

Whether the prosecutor was under a legal obligation to remove house refuse or dead animals is of no importance. If an attempt was made to impose upon him greater burdens than the contract warranted, his remedy was to refuse to do the extra work and stand on his contract rights.

The argument that the contract with the Maloney Contracting Company should have been let only after competitive bidding cannot prevail. That contract was only a means of carrying out the provisions of the original contract with Moriarty—a subcontract. The case is quite like *Camden v. Ward*, 67 N. J. L. 558. Nor is there any proof that the appropriations will be exceeded by carrying out the contract with the Maloney company. If in fact the cost will exceed the amount to be recovered of Moriarty and his surety, we must assume that the board will take measures to meet the difficulty, either by terminating the contract under the five-day clause contained therein, or by obtaining, if practicable,

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increased appropriations. We cannot assume that they will incur expense in excess of the appropriations.

We find nothing arbitrary or unreasonable in the action of the board. The fact that Moriarty had twice within six weeks pleaded guilty to violations of contract, was sufficient to justify the board in finding that his work was not satisfactorily performed.

The writ must be dismissed, with costs.

DANIEL W. MYERS v. ADOLPH FOLKMAN AND OTHERS.

Argued June 8, 1916—Decided November 10, 1916.

One claiming title to land by adverse possession must, in an action of ejectment, show that the possession continued for twenty years and that it was, in fact, adverse, that is, with the intention to claim the fee, indicated by some act on his part which would convert mere occupation of the land into adverse possession.

On defendant's rule for new trial.

Before Justices SWAYZE, MINTURN and KALISCH.

For the plaintiff, *Bourgeois & Coulomb*.

For the defendants, *John W. Wescott* and *Ulysses G. Styron*.

The opinion of the court was delivered by

SWAYZE, J. This is an action of ejectment. The record title is in the defendants. The plaintiff claims only by adverse possession. There are two insuperable difficulties in the way of his recovery—*first*, he has failed to show possession for the requisite time; *second*, his possession did not on his own uncontradicted proof become adverse until 1906.

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(1) He does not pretend that he was personally in possession for twenty years. He relies upon the possession of his predecessors in title. To make out his case, he is obliged to claim the benefit of the possession of John D. Doyle, even against Doyle's own title. To accomplish this, the plaintiff sets up a lease to John D. Doyle made by Charles R. Myers, a predecessor in title of the plaintiff, at a time when David Doyle, John D.'s father, was alive and had title to the land. The plaintiff's argument is that John D. Doyle as tenant was estopped to deny the title of Charles R. Myers, and therefore John D.'s possession was the possession of Myers, and can be tacked to the possession of other predecessors in title to the plaintiff and thus enure to his benefit. The extent of this estoppel depends on the terms of the lease. It is not produced, but its terms are made clear by the testimony of Charles R. Myers. He says it was for the same property as was described in a subsequent lease of 1898 to Doyle's sister, Mrs. Henry, which was produced; that the lease, which had not yet expired, was "virtually turned over" to Mrs. Henry; that "practically we rented the same property that John D. Doyle had rented;" that he "leased the same property to John D. Doyle that he bought from Leedom;" that the "leases evidently was taken from the deed for the property itself, not the buildings, but it just went by the deed." Myers did not know at the time of the leases, he says, that the buildings covered more land than the deed to him from Leedom called for; the first he knew the deed conveyed more than the fifty feet it purported to convey was in 1911 or 1912. The lease to Henry described the premises as "all that tract of land now occupied by party of the second part, being fifty feet fronting on the boardwalk, three hundred feet deep and including *same* (*sic*) the use of a seventeen-foot alley, rear of Missouri avenue." The dimensions, fifty by three hundred, do not include the land in dispute. We think the estoppel of the tenant to deny the landlord's title must be limited to the tract particularly described. No doubt both parties meant that the description should define as well as describe the demised premises.

(2) The second difficulty in the plaintiff's case is his failure to show adverse possession prior to 1906. He has contented himself with showing peaceful possession. He seems to think that a failure of the rightful owner to make claim is the same as a claim of adverse right made by him and his predecessors in title. It is, however, well settled that mere possession without claim of right or intent to disseize the real owner is not enough to constitute adverse possession. As Chief Justice Beasley says in *Lepore v. Todd*, 32 N. J. L. 124, 131: "It is the existence of an intention to claim the fee, and the doing of some act indicative of such intention, which convert the occupation of land into an adverse possession; and this is the doctrine on which the decision of every case proceeds." So well settled is the doctrine that Justice Depue speaking for the Court of Errors and Appeals in *Foulke v. Bond*, 41 Id. 527, repeatedly takes it for granted. Thus he says: "We have seen that entry under color of title confers an advantage in that it operates, under some circumstances, as a disseizin, and determines the *quo animo* with which the entry was made. Having color of title is also advantageous to the disseisor in giving character to his possession after entry made." So he speaks of an "*intention to assert ownership*" as evidence of adverse possession and of the necessity that the nature of the possession should be such that the real owner must be presumed to know that there was a possession adverse to his title, under which it was *intended* to make title against him.

It is hardly necessary to refer to cases in other jurisdictions where the question has been expressly ruled upon. It may, however, be well to refer to a few. In a recent English case (*Littledale v. Liverpool College* (1900), 1 Ch. 19, 23), Master of the Rolls Lindley said that possession by the plaintiffs involved an *animus possidendi*; i. e., occupation with the intention of excluding the owner as well as other people. Sir F. H. Jeune and Lord Justice Romer agreed with what the master of the rolls said as to the *animus possidendi*.

The United States Supreme Court in *Harvey v. Tyler*, 2 Wall. 328 (at p. 349), approved of an instruction to the jury

that if plaintiff's title was found to be the paramount title, and any of the defendants entered upon and took possession of the land, without *title or claim*, or *color of title*, that such occupancy was not adverse to the title of plaintiffs but subservient thereto.

The Supreme Judicial Court of Maine, in *Preble v. Maine Central Railroad Co.*, 27 *Atl. Rep.* 149, said: "That rule is that one who by mistake occupies for twenty years or more, land not covered by his deed, with no intention to claim title beyond his actual boundary, whatever that may be, does not thereby acquire title by adverse possession to land beyond the true line."

In *Robinson v. Kime*, 70 *N. Y.* 147 (at p. 152), the Court of Appeals said: "To constitute an adverse possession from which a grant will be presumed, it must have been under a claim of title exclusive of any other right, and it must have been definite, exclusive and notorious, and for a period of twenty years uninterruptedly."

Further citation of authority is useless. We think in the present case that Charles R. Myers' own testimony, the deed from Leedom, the leases to Doyle and Henry and Myers' own ignorance until 1911 or 1912, that the bathhouses were on Doyle's land, make it clear that there was a mere mistake in the location of the boundary line, and no intent to claim title to Doyle's property. The case differs from *Davock v. Nealon*, 58 *N. J. L.* 21, in that Charles R. Myers disclaims any intent to claim what did not belong to him and apparently never asserted a right to land outside the bounds of his title until 1906, when in the deed to Moore after the description by metes and bounds, he added, "and also all the right, title, property, possession and estate of the said party of the first part, in and to any and all lands in the possession and occupancy of the said party of the first part, and included within the building and fences enclosing and including the same." Then for the first time the possession became adverse.

There should have been a nonsuit because the plaintiff failed to prove adverse possession for twenty years, and the rule must be made absolute.

Newark Homebuilders Co. v. Bernards Twp. 89 N. J. L.

NEWARK HOMEBUILDERS COMPANY v. TOWNSHIP OF
BERNARDS.

Submitted July 6, 1916—Decided November 9, 1916.

Under sections 40-42 of "An act concerning townships" (*Comp. Stat.*, pp. 5591, 5592), providing for the method of assessing the cost of sidewalk improvement, an abutting owner can only be assessed with such part of the incidental expense of the work as bears the same ratio to the total incidental expense as the cost of labor and materials mentioned in the second subdivision bears to the whole cost of material and labor mentioned in section 40. Assessments for substantial grading, extra driveways for owners other than the one assessed, and for laying gutters, cannot be sustained under the section named.

On *certiorari* of sidewalk assessment.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Arthur A. Palmer*.For the township, *Harrison P. Lindabury*.

The opinion of the court was delivered by

SWAYZE, J. The assessment is made under the authority of section 42 of the act concerning townships. That authorizes the assessment of the cost of the materials, incidental grading, curbing, recurbing, paving, relaying, repairing and finishing of all sidewalks fronting on or bordering upon the lands so improved and described in subdivision 2 of section 40, plus a proportionate part of the incidental expenses mentioned and described in section 41. Upon referring to section 40 it appears that subdivision 2 relates only to the materials, incidental grading and the curbing, recurbing, paving, relaying, repaving and finishing of the sidewalks in front of or bordering upon the land so to be improved. These items are set over against the items mentioned in subdivision 1, which are the substantial grading necessary to raise or

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reduce the ground on which the sidewalks, gutters and crosswalks are to be constructed to the grade established therefor, the incidental grading and the laying of the crosswalks, the incidental grading and curbing of those portions of sidewalks that lie in the angles at the intersection of streets. Those parts of the sidewalk improvement described in subdivision 2 are sharply distinguished from those described in subdivision 1, and when it comes to the incidental expenses of the work, the township is authorized only to assess such part of those expenses as bear the same ratio to the total incidental expenses as the cost of materials and labor mentioned in the second subdivision bear to the whole cost of material and labor mentioned in section 40. The reason for this sharp distinction is made plain by the fact that section 42 authorizes an assessment on the abutting property in proportion to the lineal feet of frontage. Evidently the legislature had in mind the private rights in the sidewalk as a justification for assessing the whole cost of the sidewalk so far, and so far only, as private property abutted thereon.

The present assessment was not made in accordance with the statute. The property has been assessed for substantial as well as for incidental grading; for extra ten-inch concrete sidewalks, for driveways, to the benefit of certain properties only, although the cost has been apportioned among the total frontage, and for gutters. The first two items are clearly not authorized. We have reached the same result as to gutters in view of the evident intent of the statute and the fact that gutters are mentioned in subdivision 1 and not in subdivision 2. An error of forty-three feet in measuring the prosecutor's frontage is conceded in defendant's brief. We think the prosecutor has also established an additional error of twenty feet due to the failure to allow the width of a street that has been dedicated to the public. The assessment must be set aside, with costs, as to all prosecutors who have joined in the suit.

If counsel can agree upon the figures, a new assessment will be made by the court. If they cannot agree, we will appoint commissioners to ascertain the proper amount and make the assessment.

Security Trust Co. v. Edwards.89 N. J. L.

SECURITY TRUST COMPANY, EXECUTOR OF LEONARD MORSE, v. EDWARD I. EDWARDS, COMPTROLLER.

Submitted July 6, 1916—Decided November 9, 1916.

Stocks in New Jersey corporations, pledged by a non-resident during his lifetime as collateral security for a note, are not subject to the transfer tax at his death under the act of 1914 (*Pamph. L.*, p. 267), imposing a tax on such shares when transferred by will or intestate laws, since the rights of the unpaid pledgee in the stocks did not permit of a transfer of the stocks by the will of the deceased pledgor.

On *certiorari* of inheritance tax.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Ralph E. Lum* (*Joseph F. McCloy*, of the New York bar) on the brief.

For the defendant, *Herbert Boggs*, assistant attorney-general.

The opinion of the court was delivered by

SWAYZE, J. Leonard Morse, a resident of Hartford, Connecticut, in his lifetime pledged certain stocks of New Jersey corporations and other collateral with the Phoenix National Bank of Hartford as security for a note and died testate, no part of the note having been paid. The question presented by this case is whether the New Jersey stocks so pledged are subject to the transfer tax under the act of 1914. *Pamph. L.*, p. 267. That act, so far as material to this case, imposes the tax when the transfer is by will or intestate law of shares of stock of corporations of this state. The question therefore narrows to whether the testator's will transferred these stocks. He did not own the stocks; at most he had an interest therein, which was subject to the rights of the pledgee, and the pledgee could not be deprived of its property right to

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transfer the shares to a purchaser and apply the proceeds to the debt. There might or might not be a valuable equity, but all that could be transferred by testator's will was the right to redeem, or if the stocks had been transferred by the pledgee, the right to an accounting and the payment of the balance, if any, after satisfaction of the debt. There could be no transfer of stock within the meaning of the statute until and unless the debt was paid. The pledgee might sell and transfer the New Jersey stocks and apply the proceeds to payment of the debt and leave no equity therein, since their value was less than the debt; in that event, the transfer of the stocks would be by virtue of the power of attorney given by the testator in his lifetime and not by his will or by intestate law as required by the statute. The question has been decided in the same way by the courts of New York. We cannot add to the reasoning of Surrogate Fowler. *Estate of Ames*, 141 N. Y. Supp. 793.

We are not called upon by the facts of this case to express an opinion on the question that would be presented if the debt was satisfied out of other collateral and the New Jersey stocks or some of them still remained in the hands of the pledgee. The tax must be set aside.

JOHN D. SMITH AND OTHERS v. THE TRUSTEES OF THE
BETHEL AFRICAN METHODIST EPISCOPAL CHURCH
OF JERSEY CITY, A CORPORATION.

Argued October 21, 1916—Decided October 27, 1916.

A writ of *mandamus* will not issue to compel trustees *de facto* of a corporation to call an election for trustees where the title *de jure* of the trustees *de facto* is disputed. *Quo warranto* is the proper proceeding in such a case.

On application for *mandamus*.

Smith v. Trustees Bethel A. M. E. Church. 89 N. J. L.

Before Justice SWAYZE.

For the relators, *Robert S. Hartgrove*.

For the defendants, *Eugene R. Hayne*.

The opinion of the court was delivered by

SWAYZE, J. The trustees of the Bethel African Methodist Episcopal Church of Jersey City is a corporation under the act to incorporate associations not for pecuniary profit. No by-laws were ever adopted, but it seems to have been the custom to elect trustees on the 31st day of August in each year. At any rate it is proved and undisputed that such an election was held August 31st, 1915, and there is no suggestion that that election was invalid. By the statute these trustees held office, in the absence of any by-laws to the contrary, for one year and until their successors should be elected. Dissensions arose and the faction represented by the relators gave notice of a meeting on July 27th for the purpose of amending the certificate of incorporation, so as to change the name and the number of trustees. The faction supporting the pastor gave notice of a meeting on that day for the election of trustees to serve for one year from that date. Which notice was given first is not proved, nor do I think it material. A notice was also given by the relator's faction for a meeting to elect trustees on August 31st. Trustees were elected at the meeting of July 27th, and are made defendants to the present application. Whether an election was held on August 31st does not definitely appear, but I assume none was held since the relators now apply for a *mandamus* to compel the holding of an election for trustees. The relators seek a writ of *mandamus* to compel the individual defendants as trustees *de facto* to call an election.

It is clear that the real question involved is the title of the individual defendants to the office of trustees. It is not denied that ordinarily the title to office in a private corporation must be tested by *quo warranto*. The relators urge that this case involves only a question of law and is so clear that

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a *mandamus* should issue under the rule of *Leeds v. Atlantic City*, 52 N. J. L. 332. The question as is shown by Mr. Justice Garrison's review of the authorities is often a nice one. What determines me to deny a *mandamus* in this case is—*first*, the fact that the relators themselves ask that the writ go against the trustees elected on July 27th. Unless there was a real election, illegal though it may have been, the *de facto* trustees, the present defendants, would be without power even to give notice for an election. *Second*, the legality of the election may depend upon the way in which it was conducted and whether the book of discipline of the church had in effect been adopted in lieu of by-laws—a question of fact proper for a jury. The relators are not, however, estopped to deny the validity of the election. They have sought in an orderly way to test the question by recognizing the defendants as being *de facto* trustees whose *de jure* title is disputed. This they may dispute. I think a writ in the nature of a *quo warranto* should issue since it seems probable that the election was not held on the proper day and was conducted in accordance with the book of discipline instead of the law of the state. Let such a writ issue.

FRED VEADER, EXECUTOR, APPELLANT, v. SAMUEL
VEADER, RESPONDENT.

Submitted March 16, 1916—Decided November 9, 1916.

In a suit to recover the proceeds of certain pension checks, endorsed by deceased during his lifetime to defendant, evidence to prove a verbal statement made by the deceased, not in the presence of the defendant and not contemporaneous with the giving of any check, where the object of such testimony was to show, by deceased's declaration, that the checks had not been endorsed to the defendant as a gift, is inadmissible.

On appeal from the Morris Circuit.

Veadar v. Veadar.

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Before GUMMERE, CHIEF JUSTICE, and Justices SWAYZE and BERGEN.

For the appellants, *Elmer W. Romine*.

For the respondent, *King & Vogt*.

The opinion of the court was delivered by

SWAYZE, J. This suit is to recover the proceeds of certain pension checks which were endorsed by the pensioner, defendant's father, to the defendant. The endorsement of the checks and the receipt of the money by the defendant are admitted. The executor's claim is that the defendant was to collect and hold the money for his father. The jury found to the contrary, and the only question before us is the admissibility of evidence. The checks were delivered on the various quarter days, from May, 1911, to November, 1913. The plaintiff sought to prove a verbal statement by the father in February, 1912, not in the presence of the defendant and not contemporaneous with the giving of any check, with reference to the checks and the pension money. Confessedly, the object was to show by the father's declaration that the checks had not been endorsed to the defendant as a gift, and that the father, the plaintiff's testator, still retained the beneficial interest therein. The evidence was excluded and the question now is, was it admissible? The case differs from cases where there is a dispute as to whether the acts were performed—for example, whether a decedent was in a certain place (*Hunter v. State*, 40 N. J. L. 495), or whether a will was made (*State v. Ready*, 78 Id. 599), and from cases where the declaration is not self-serving. We are referred to *Speer v. Speer*, 14 N. J. Eq. 240. The question in that case was whether declarations of a grantor subsequent to a conveyance were competent evidence to prove that the conveyance was by way of advancement. Chancellor Green was careful to say that such declarations would be clearly incompetent to invalidate the title of the grantee. That is, in part, the very object with which they are here offered. As to past acts the

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effort was to characterize them in such a way as to invalidate the son's title to the checks, by subsequent declarations of the endorser as to what he had meant at the time—declarations favorable to the declarant's own pecuniary interest. As to the past the declarations were clearly inadmissible. It is so, also, as to the future. It is well established that declarations, contemporaneous with the act, necessary to characterize what would otherwise be ambiguous or uncertain, are admissible. They are admissible, because without the declaration the legal effect of the act would be uncertain. For example, in the present case, the endorsement of the checks might have been meant as a gift to the son or a mere delivery to him as the father's agent. Whether it was or was not a gift depended on the intent of the father at the time of the endorsement, and his intent would be best evidenced by his language at the time. But a declaration of his intent in the future would be of no evidential value. A declaration that he would never endorse another check to the son might be admissible if the question at issue were the fact of the endorsements; but when that fact is conceded, and the only issue is as to the intent with which the endorsement was made, it is only the intent at the time that is of consequence. Until that time, the right of the endorser to change his mind could not be trammelled by his prior declaration. The cases in our reports affirming the admissibility of such declarations are careful to limit the admissibility to declarations that are contemporaneous with and give character to the transfer. *Luse v. Jones*, 39 N. J. L. 707, is the leading case.

We find no error and the judgment is affirmed.

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JOSEPH WEST AND OTHERS v. THE CITY OF ASBURY
PARK AND OTHERS.

Submitted July 6, 1916—Decided November 21, 1916.

Chapter 136 of the session laws of 1916 (*Pamph. L.*, p. 283), regulating the operation of auto buses, or jitneys, in cities of this state, which requires as a prerequisite to municipal consent to such operation the filing of a bond by the owners of such vehicles against bodily injury or death as a result of an accident occasioned by the operation of such vehicles in the public streets, and the imposition of a tax on gross receipts of five per cent., does not violate the fourteenth amendment to the federal constitution requiring equal protection of the laws.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutors, *Charles F. Dittmar*.

For the defendants, *Durand, Ivins & Carton*.

The opinion of the court was delivered by

SWAYZE, J. The power of the legislature to authorize municipal corporations to regulate the use of the streets by vehicles, even to the extent of excluding vehicular traffic, is established. *Barnes v. Essex County Park Commission*, 86 N. J. L. 141. The power to regulate the use by automobiles and motor vehicles is also settled. *Unwen v. State*, 73 Id. 529; *affirmed*, 75 Id. 500; *Cleary v. Johnston*, 79 Id. 49; *Kane v. State*, 81 Id. 594; *Hendrick v. Maryland*, 235 U. S. 610.

The only questions open in the case are—*first*, whether the city has been authorized by the legislature to regulate the use by auto buses, commonly called jitneys, in the manner prescribed by the ordinance now in question; *second*, whether the attempted regulation is so discriminatory as to deprive the owners of the equal protection of the laws.

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The power of the city is to be found in its charter (*Pamph. L.* 1897, p. 46; *Comp. Stat.*, p. 1297) and in the act of 1916 (*Pamph. L.*, p. 283). The charter authorizes the council to regulate, clean and keep in repair the streets and highways (section 18, par. 7), to regulate the speed and running of motor, electric or other cars through the city (par. 11), and to license and regulate all carriages and vehicles used for the transportation of passengers and goods and chattels of any kind, and the owners and drivers of vehicles and means of transportation, and to impose license fees for revenue (par. 26), and to make and establish such other ordinances as they may deem necessary to carry into effect the powers and duties conferred on them and as they may deem proper for the good government, order, protection of persons and property, preservation of the public health and prosperity of the city. *Comp. Stat.*, p. 1305, pl. 2458.

The act of 1916 requires the owner of an auto bus to obtain the consent of the board having control of public streets for the operation of the auto bus and the use of the streets; it enacts that no such consent shall become effective and no such operation shall be permitted until the owner has filed with the chief fiscal officer of the city an insurance policy of a company duly licensed to transact business, in the sum of \$5,000, insuring against loss from liability imposed by law upon the owner of the auto bus for bodily injury or death, as the result of accident occurring by reason of the ownership, maintenance or use of the auto bus on the streets. The statute also requires that the owner shall execute a power of attorney to the fiscal officer of the city to acknowledge service of process. Section 3 requires the payment to the city of five per cent. of the gross receipts as a monthly franchise tax for revenue for the use of the city.

The ordinance provides that the board of commissioners of the city may determine the reasonable seating capacity of an auto bus, the routes, hours of service and terminal points, and makes it unlawful to omit to operate an auto bus over the designated route during the hours prescribed in the consent of the city; to omit to display a sign to indicate that

the consent has been granted; to operate an auto bus without displaying a sign showing the terminal and route, and the amount of fare when it exceeds five cents; to operate an auto bus with passengers riding outside the body of the bus, or with a greater number of passengers than the auto bus is entitled to carry; to drive rapidly past an auto bus, trolley car, or vehicle to obtain a passenger; to race with any other vehicle; to refuse to carry passengers unless the auto bus is loaded to its capacity; to permit an auto bus to stand in a street outside of the stand provided, for a longer time than is necessary to take on or discharge passengers; to receive or discharge passengers except at the curb, or the regularly provided stand, and except at the nearest side of street intersections and on the right hand side of the street; to place a sign on the windshield or where it might obscure the view of the driver. It is also made unlawful for the driver to collect fares or to take on or discharge passengers while the auto bus is in motion.

We think all the provisions we have recited are well within the express powers given to the council or within the powers necessarily inferred from the general clause. That like powers may be implied from the general control of streets has long been settled. We need refer only to the leading case of *Commonwealth v. Stodder*, 2 *Cush.* 562.

The stress of the argument was upon other points. It is urged that the requirement of a bond from the owners of auto buses when it is not required from the owners of other vehicles, and the imposition of a tax of five per cent. on the gross receipts, when no such tax is imposed upon others, is such an unjust discrimination as to deprive the owners of auto buses of the equal protection of the laws. The ordinance in these respects simply follows the act of 1916, and if that act is within the power of the legislature, this objection to the ordinance falls. As we have no provision in our state constitution securing in express terms the equal protection of the laws, the question thus raised is a question arising solely under the fourteenth amendment to the federal constitution. The rule in questions of this kind is now so well settled by

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decisions of the United States Supreme Court, that no extended discussion is required. That rule is that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection; but the classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. Two citations suffice to illustrate the line of cleavage between permissible and unpermissible classification. *Gulf, Colorado and Sante Fe Railway Co. v. Ellis*, 165 U. S. 150; *W. W. Cargill Co. v. Minnesota*, 180 Id. 452. We must apply this rule to the facts of the pending case. The statute applies only to auto buses, which are defined as any automobile or motor bus, commonly called jitney, engaged in the business of carrying passengers for hire, which is held out, announced or advertised to operate or run, or which is operated or run over any streets or public places in any city, and indiscriminately accepts and discharges such persons as may offer themselves for transportation either at the termini, or points along the way or route on which it is used or operated or may be running. Stated shortly, the act applies to motor buses plying the business of transporting passengers indiscriminately, accepting and discharging them at any point. We think the legislature had the right to legislate as to such a business by itself in respect to the requirement of a bond, and a tax on gross receipts. The business differs from that of the ordinary hired cabs in that the latter do not stop between termini, charge, or are supposed to charge, each passenger with the cost of his transportation, and hence may avoid crowded streets, are under no temptation to race for passengers, and do not require a special and expensive roadway, while auto buses defined as they are in the act, charge a price that can only pay the necessary running expenses when many passengers are carried and must in order to succeed, run where the streets are crowded, and are naturally under a temptation to secure as many passengers as possible, even by dangerous racing with one another, and by reason of size and power require a specially constructed

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and expensive roadway. Auto buses as defined in the act differ on the other hand from street railways, in that the latter are confined to a certain portion of the street where their rails are and cannot by varying their course endanger life or limb in any other portion of the street, and run moreover on a way fitted specially for their purpose at their own expense, while auto buses may use any portion of a way provided at public expense. These differences are necessary and inherent. Other differences exist in fact to the common knowledge of all. Street railways require a considerable, often a very large capital, and an investment in fixed plant, which affords at least some security for the payment of damages for bodily injury or death incident to their operation. The owner of an auto bus need own nothing else and in case of injury to others by reason of his negligence, may readily remove all his property from the jurisdiction of the court. The danger of accident arising from the use of all swift-moving vehicles in crowded streets, the possible lack of financial responsibility in the owner of an auto bus, and the ease of escaping from the jurisdiction, form a reasonable basis for the requirement of a bond and a power of attorney to acknowledge service of process. The fact that the owner of an auto bus is conducting a business in the public streets by picking up passengers at any point, and not merely using the streets for passage from terminus to terminus, and the use of a specially constructed way provided at public expense, form a reasonable basis for the imposition of a special tax. This is as far as the court can go. If there is a rational distinction, as we think there is, the legislature is not restrained by the constitutional limitation. The right to impose special occupation taxes is well settled, and the discretion reposed in the legislature is great. We need cite only two cases, selected because they are analogous to the present. In *Savannah, Thunderbolt and Isle of Hope Railway v. Savannah*, 198 U. S. 392, the court sustained a special tax upon a street railway, although none was imposed upon a steam railroad, making an extra charge for local deliveries of freight brought over its road from outside the city. In *Metropolitan Street*

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Railway Co. v. New York, 199 *Id.* 1, it was held that a tax on surface street railroad franchises does not deprive the owners thereof of the equal protection of the laws because sub-surface street railroad franchises are not subjected to a similar tax.

As we have said, the question raised in this case is to be determined by the legal rules established by the federal courts. It is gratifying to find that in the application of those rules to the peculiar circumstances of the case, our views coincide with those of other courts where similar or identical legislation and ordinances have been brought in question. As far as the decisions of other courts have been brought to our attention by the defendants' brief or discovered by us, they are unanimous. It would serve no useful purpose to cite them.

The writ is dismissed, with costs.

ATLANTIC COAST ELECTRIC RAILWAY COMPANY, PROSECUTOR, v. BOARD OF PUBLIC UTILITY COMMISSIONERS AND BOROUGH OF BRADLEY BEACH.

Argued June 7, 1916—Decided December 1, 1916.

1. When a traction company, organized under the General Traction act of 1893 (*Pamph. L.*, p. 302; *Comp. Stat.*, p. 5021), obtains from a municipality an ordinance granting a location of street railway tracks, and accepts the same, a regulation of the rate of fares contained therein, if lawful and reasonable, constitutes a contract between the company and the municipality which during the life of the franchise remains inviolable, and it is incompetent for the board of public utility commissioners to impose upon the company an additional burden in violation of such contract respecting fares.
2. An ordinance passed by a municipality pursuant to the General Traction act of 1893 (*Pamph. L.*, p. 302; *Comp. Stat.*, p. 5021), granting a location of street railway tracks, and providing therein respecting the rate of fare that "no more than five cents shall be charged by the company," gives the company, when accepted by it, a contract right to charge a five-cent rate, which rate cannot be reduced without the consent of the company.

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3. Where an ordinance passed by a municipality pursuant to the General Traction act of 1893 (*Pamph. L.*, p. 302; *Comp. Stat.*, p. 5021), granting a location of street railway tracks, contained a restriction that the fare in a stated territory shall be "no more than five cents," and such ordinance is accepted by the company, such contract is binding both upon the company and the municipality, even though the territory covered by such fare zone is partly outside the corporate limits of the municipality.

On *certiorari*, &c.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the prosecutor, *Durand, Ivins & Carton* and *Robert H. McCarter*.

For the board of public utility commissioners, *L. Edward Herrmann* and *Frank H. Sommer*.

For the borough of Bradley Beach, *Ward Kremer*.

The opinion of the court was delivered by

TRENCHARD, J. The Atlantic Coast Electric Railway Company operates a trolley line or street railway from the junction of Main street and Cookman avenue, in Asbury Park, southerly through other municipalities and the borough of Bradley Beach to Belmar. It also operates another branch from the northern terminus of the above-described line, eastwardly along Cookman avenue, in Asbury Park, and through that city and beyond.

On February 9th, 1916, the board of public utility commissioners, at the request of the borough of Bradley Beach, after a hearing, ordered "the Atlantic Coast Electric Railway Company to give to all persons boarding its northbound cars, in Bradley Beach, who on payment of fare of five cents on such cars request transfers to its cars operating easterly on Cookman avenue, Asbury Park, said transfers, the same to be accepted by the company for a ride on Cookman avenue easterly as far as Kingsley street, Asbury Park; and * * *

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to give to all persons boarding its westbound cars on Cookman avenue, who on payment of fare of five cents on such cars request transfers to its cars operating southerly on its Belmar line, said transfers, the same to be accepted by the company for a ride on its Belmar line to the southerly boundary of Bradley Beach."

This writ of *certiorari*, sued out by the company, brings under review the validity of that order.

We are of the opinion that it cannot be sustained.

Among other reasons urged against the order is that "the ordinances under which the company is operating through Bradley Beach, on the Belmar and Sea Girt line, provide for a five-cent fare to Cookman avenue, Asbury Park, and exact from the company annual payments in consideration of the privileges granted, and are contracts between the company and municipalities, including the borough of Bradley Beach, and the order of the board of public utility commissioners is in violation of these contracts and illegal."

The company was organized under the General Traction act of 1893 (*Pamph. L.*, p. 302; *Comp. Stat.*, p. 5021), and in 1897 obtained from the borough of Bradley Beach its ordinance above referred to. This ordinance was approved September 8th, 1897. It recites the application of the company for permission to construct, operate and maintain a new line of street railway through certain streets in accordance with a designated route, and grants such permission "to construct, operate and maintain a new line of street railway in, through and upon the public street or highway in said borough of Bradley Beach, commonly known as the main public road leading from Asbury Park through the borough of Bradley Beach to Belmar, called Main street, and extending therein from the extreme northern boundary line of said borough of Bradley Beach southwardly to the extreme southern boundary line of said borough, conformably to the route designated," &c. This is the line in question.

The twelfth section of the ordinance provides:

"That the rate of fare shall be five cents for the transportation of any passenger for one continuous ride on the cars of

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said company, in any direction within the corporate limits of said borough, and *no more than five cents shall be charged by said company for the transportation of any passenger for one continuous ride in either direction on the cars of said company from Cookman avenue, in Asbury Park, to any point in Belmar on the route on said railway, or to any other point on said route whenever said railway of said company shall be constructed and in operation over its said route between Asbury Park and the southern boundary line of the borough of Belmar.*"

The nineteenth section provides that the permission, rights and privileges thereby granted to the company shall continue for a period of fifty years. The twentieth section provides that as compensation for the rights and privileges thereby granted, the company shall, at its own cost and expense, grade and gravel stated portions of the street, and shall pay to the borough \$250 annually during the fifty years for which the franchise is granted.

This ordinance was accepted by the company, the line between the two termini thereof was constructed and put in operation, a five-cent fare was established thereon, and the company has hitherto fulfilled its obligations as imposed by the ordinance.

It was, of course, under the law, necessary for the company to secure the consent given by the ordinance before it could build its trolley line through Bradley Beach.

And section 32 of the Traction act (*Comp. Stat.*, p. 5035) provides:

"That any consent required by this act to be given by any public body may be given by a resolution or ordinance of such body, which consent, when accepted by any corporation created under this act, * * * shall have the force and effect of a contract."

The statute leaves the amount of compensation to be charged by such a company entirely open, there being no provision as to the rate of fares in the act. Other provisions of the statute, however, require that the company, before it shall construct its line, shall present to the governing body of the

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municipality a petition and plan of construction, and the municipality, after consideration, shall "either pass a resolution refusing such location or pass a resolution or ordinance, as may be necessary or proper, granting the said location or any part thereof, *under such lawful restrictions as they deem the interests of the public may require,*" &c. *Comp. Stat.*, p. 5025, § 7.

Now, in *Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227, Mr. Justice Pitney, for this court, speaking of this legislative provision, said:

"The 'lawful restrictions' that are to be made in the interest of the public indicate, likewise, a legislative act. In short, the statute, as we take it, plainly imports that the common council or other governing body of the municipality is to perform a legislative function in granting a special user of the public highway to a traction company, and in setting bounds and limits to its user and imposing conditions thereon; while, on the other hand, the traction company likewise is dealt with as a public agency, and not a mere private entity; in its application to the council it not only seeks an opportunity for private profit, but it tenders itself a volunteer to the public service, offering to embark the capital of its stockholders in a public improvement and to assume correlative duties. The proceeding has for its purpose the completion of the general 'charter' of the company by the acquisition of a local 'franchise.' It results that when the franchise is granted, subject to conditions and restrictions, and when the traction company proceeds to lay its tracks in the street and run its cars thereon, that property and those franchises become impressed with a public use that imposes the duty upon every successive holder to serve the public in accordance with the terms of the original grant."

In view of the further provisions of the act that the consent required by the act to be given by the municipality, when accepted by the company, "shall have the force and effect of a contract," it has, of course, been frequently held that the restrictions thus imposed, if lawful and reasonable, constitute a contract between the company and the municipality which

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thereafter remain inviolable. *Jersey City v. Jersey City and Bergen Railway*, 70 N. J. L. 360; *Jersey City v. North Jersey Street Railway Co.*, 72 Id. 383; *Newark v. North Jersey Street Railway Co.*, 73 Id. 265.

That regulations as to the rate of fare are properly classed among such "restrictions" seems quite plain.

Recently, Mr. Justice Voorhees, writing for the Court of Errors and Appeals, in *Reed v. Inhabitants of Trenton*, 80 N. J. Eq. 503, 506, said:

"That a municipality, as a condition precedent to granting permission to a traction company to construct and operate a street railway within its corporate limits has power to impose lawful restrictions, in the interest of the public, that regulations of rates of fare are properly classed among such restrictions and come within the terms of the statute, and that the acceptance of such an ordinance by the company constitutes a contract are too well settled to require discussion. The contract thus entered into is evidenced by the terms of the ordinance and is to be construed by the ordinary rules of law applicable to that subject."

As stated by the Supreme Court of the United States in *Detroit v. Detroit Citizens' Street Railway Co.*, 184 U. S. 368:

"The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement."

It is, therefore, well settled that one of the "restrictions" which the municipality under the legislative authority may impose, as a condition of its consent to the location of tracks within its corporate limits, is the rate of fare that shall be charged, and such restriction, when the ordinance is accepted, becomes a contract. Any other interpretation of the statute is impossible, particularly in view of the provision to the effect

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that such consent, with the restrictions, when accepted, shall constitute a contract.

Such a contract neither party can violate without the consent of the other. Should the company apply to the utility board to have the rate of fare increased, it would, undoubtedly, be met with its contract. The case of *Borough of North Wildwood v. Board of Public Utility Commissioners*, 88 N. J. L. 81, is not to the contrary. * There the commission had authorized a higher rate than had been previously prescribed, and the only question was as to its power so to do against the objection of the municipality. The opinion says:

“While the municipality itself has not assented to a change in rate, the state, its creator and parent, has done so through a specially constituted agency. *If the water company were here complaining that its contract rights were being impaired, a different question would be presented;* but the contract right of one of the state’s creatures may be waived by the creator.”

The effect, then, of this ordinance, with its acceptance and action thereunder by the trolley company, being to constitute a contract between the company and the municipality, it is incompetent for the board of public utility commissioners, just as it is incompetent for the municipality itself, to violate that contract by imposing upon the company an additional burden, the effect of which is to require it to carry passengers for the same fare not to but beyond Cookman avenue.

But it is contended that the ordinance does not in fact entitle the company to charge a five-cent fare. We see no merit in this contention. The great weight of authority is that an ordinance which provides, as does the one in question, that “no more than five cents shall be charged,” gives the company a contract right to charge a five-cent rate, which rate cannot be reduced without the consent of the company.

In *Cleveland v. Cleveland City Railway Co.*, 194 U. S. 517, the street railway company had similar rights under ordinances, one of which provided that the company “*should not charge more than five cents fare*” each way for one passenger over the whole or any part of its line. The city of Cleveland

undertook to reduce the fare. The Supreme Court of the United States, after showing that the legislature of Ohio lodged in the municipal council of Cleveland power to contract with street railway companies with respect to the terms and conditions upon which such roads might be constructed and operated, held that such ordinances when accepted became contracts between the company and the municipality, which the municipality was powerless to abrogate, and that the new ordinance seeking to reduce the fares impaired the contract. That court had already held, in *Detroit v. Detroit Citizens' Street Railway Co.*, *supra*, that the language of an ordinance which provides that the rate of fare for one passenger "*shall not be more than five cents*," does not reserve or give to the city any right to reduce such fare below the rate of five cents established by the company. To the same effect is *Cleveland v. Cleveland Electric Railway Co.*, 201 U. S. 529, and also *Minneapolis v. Minneapolis Street Railway Co.*, 215 Id. 417.

It remains, then, to consider whether or not the restriction is a lawful one, and it has been suggested that inasmuch as it undertakes to apply to passage beyond the corporate limits of the borough, it is *ultra vires* the municipality. We think, however, there is no merit in this suggestion.

The prosecutor was a trolley company, chartered, and proposing to run a line from Asbury Park to Belmar. It applied to Bradley Beach, an intermediate municipality, for permission to locate its tracks through that borough. That municipality was authorized to impose lawful restrictions in the interest of the public. The other municipalities involved, by ordinances locating the tracks of the line in question through their respective territories, imposed similar restrictions, so that the territory between Belmar and Asbury Park constituted one-fare zone. We think that the municipality of Bradley Beach might legitimately conclude, as it did, that the "public interest" justified it in exacting, as a condition of the privilege to the company to operate within its corporate limits, that a stated fare be exacted over a given territory, notwithstanding such territory is partly outside its corporate limits. It is unnecessary for the borough in upholding its

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exactions to operate beyond its boundaries. It simply requires the trolley company, as a condition of its contract, to make a certain agreement with reference to its fare. In *Reed v. Inhabitants of Trenton*, 80 N. J. Eq. 503, *supra*, the ordinance of the city of Trenton under review expressly provided that—

“The rate of fare within the present limits of the city of Trenton for each passenger shall be three cents, and outside of the city limits, within a radius of five miles, five cents
* * *”

It was not intimated either by the Chancellor or by the Court of Errors and Appeals that the five-cent provision applying outside of the city limits was for that reason illegal. On the contrary, the Chancellor said that “the power of the city to impose the terms and conditions in the ordinance contained is undoubted,” and the Court of Errors and Appeals seems to have regarded the acceptance of an ordinance with such a condition as a contract binding both the city and the accepting company. What the court decided was that the company in procuring the franchise with that provision from the city of Trenton did not and could not bind other companies. It was not intimated or suggested that if the lines of the applicant itself had extended beyond the city limits it would not have been bound by the rate.

In *Rice v. Detroit, &c., Railway*, 122 Mich. 677; 81 N. W. Rep. 927, the franchise granted by the township of Dearborn was under consideration. The franchise provided for the sale of trip tickets on cars of the company at a reduced rate between a village in the township and a city outside the township. Chief Justice Montgomery said (at p. 928):

“We have, then, a case in which defendant is operating under a franchise imposing a duty to sell five tickets for fifty cents, good between the city hall, Detroit, and any point in the village of Dearborn. * * * It is contended that the franchise is in force only within the territorial limits of the village and does not cover territory in other townships. We do not think this contention can be sustained. The franchise is in the nature of a contract, and imposes obligations upon the company which those having occasion to ride from Dear-

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born to Detroit have a right to enforce. * * * The defendant saw fit to contract with the village of Dearborn for a rate outside the limits of the village, and to agree that tickets should be sold on its cars. This contract it cannot repudiate."

A somewhat analogous situation is dealt with in *Camden and Amboy Railroad Co. v. Briggs*, 22 N. J. L. 623, where a charter of a railroad company restricting rates to be charged by a railroad company beyond the limits of the state was sustained. The reasoning of this case, as well as of *Raritan and Delaware Bay Railroad Co. v. Delaware and Raritan Canal Co.*, 18 N. J. Eq. 546, is applicable. It is common knowledge that municipalities frequently make exactions of this character, and they are not to be vitiated for that reason.

The order under review will be set aside.

HERMAN RABB, PLAINTIFF AND RESPONDENT, v. W. P. ELLISON, INCORPORATED, BUILDER, AND HENRY SINCLAIR, OWNER, DEFENDANTS AND APPELLANTS.

Submitted July 6, 1916—Decided November 22, 1916.

1. By the term "building" as used in section 1 of the Mechanics' Lien law (*Comp. Stat.*, p. 3291) is meant "An edifice constructed for use or convenience, as a house, a church, a shop, &c., attached to and becoming a part of the land itself."
2. A structure of frame and iron attached to land, and designed for professional baseball purposes, and consisting of a grandstand, roofed, floored and in parts enclosed, containing club houses, dressing, bath, heating, locker and toilet rooms, refreshment booths, offices, stairs and seats; bleacher stands having flooring, seats and toilet rooms; and high, tight board fences enclosing the playing field and physically connected with the stands, is a "building" within the meaning of the term as used in section 1 of the Mechanics' Lien law. *Comp. Stat.*, p. 3291.

On appeal from the Hudson County Circuit Court.

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Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the appellants, *Davis & Hastings*.

For the respondent, *George D. Hendrickson*.

The opinion of the court was delivered by

TRENCHARD, J. The plaintiff below recovered a judgment in a mechanics' lien suit.

The sole question on this appeal is whether the structure upon which the plaintiff's labor and materials were expended is liable for such labor and materials.

We think that question must be answered in the affirmative.

The first section of the Mechanics' Lien law (*Comp. Stat.*, p. 3291) provides that—

"Every building hereafter erected or built within this state shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected."

The question is further narrowed by the fact that the sole contention is that the structure is not a "building" within the meaning of that term as used in that section of the law.

By the term "building" as there used the legislature meant "an edifice constructed for use or convenience, as a house, a church, a shop, &c., attached to and becoming a part of the land itself." *Coddington v. Dry Dock Co.*, 31 N. J. L. 477.

Now the structure in question is of frame and iron and is designed for the professional baseball purposes of the Newark baseball club of the federal league. It consists of a grandstand, roofed, floored and in parts enclosed, containing club houses, dressing, bath, heating, locker and toilet rooms, refreshment booths, offices, stairs and seats; bleacher stands having flooring, seats and toilet rooms; and high, tight board

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fences enclosing the playing field and physically connected with the stands.

Manifestly such a structure is a building within the meaning of that term as defined.

It was constructed by the owner on land for business purposes. It was designed for the shelter, use and convenience of the management of a professional baseball club and their agents, players and patrons. It was a single structure, in part roofed and enclosed, every part of which was essential to the purpose for which it was designed.

The judgment below will be affirmed, with costs.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
ABRAHAM BLOOM, PLAINTIFF IN ERROR.

Submitted July 6, 1916—Decided November 13, 1916.

1. Upon the trial of an indictment for the carnal abuse of a female child, it is the right of the accused to prove his reputation for morality current in the neighborhood where he resides, and where it appears that a witness resides in the same neighborhood, it is error injurious to the accused to exclude the testimony of such witness as to whether he knew such reputation and what it was.
2. Upon trial for carnal abuse of a female child, where the testimony of the prosecutrix tended to show sexual intercourse, it is erroneous to exclude the testimony of the police surgeon, tendered by the accused, as to what he found to be the physical condition of the prosecutrix after the alleged abuse, for while sexual intercourse was not essential to conviction, yet the testimony of the physician, if it had been admitted and had tended to contradict the prosecutrix, would have had a legitimate bearing upon the credibility of the prosecutrix as a witness.
3. Upon trial for carnal abuse of a female child, it is erroneous to exclude the cross-examination of the prosecutrix as to whether she had not said that a man other than the defendant had committed the assault upon her, the question being put and being competent as affecting her credibility as a witness.

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4. Upon trial for carnal abuse of a female child, it is erroneous to permit the state to prove other criminal acts of the accused with others than the prosecutrix, not a part of the *res gestæ*, and having no logical relation to the crime charged except that they may have all resulted from the criminal disposition of the accused.

On error to the Hudson Quarter Sessions Court.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the plaintiff in error, *Alexander Simpson* and *William M. Atkinson*.

For the defendant in error, *Robert S. Hudspeth*, prosecutor of the pleas, and *George T. Vickers*, assistant prosecutor of the pleas.

The opinion of the court was delivered by

TRENCHARD, J. ✓ The defendant was indicted for and convicted of the carnal abuse of a female child, and this review is under sections 136, 137 of the Criminal Procedure act. ✓

Complaint is made that the learned trial judge erred in excluding proof of defendant's reputation for morality, and that the defendant was injured thereby. We are of the opinion that the complaint is well founded.

The defendant called Maurice Spapiro as a witness and proved by him that both he and the defendant lived in the same neighborhood. The defendant's counsel then put this question to the witness: "Do you know what his (defendant's) reputation is in the neighborhood for morality?" The question was objected to by the prosecutor of the pleas, and overruled by the judge, upon the theory that "no foundation had been laid for it." But that was a mistaken notion. The witness, having testified that both he and the defendant resided in the same neighborhood, it was the right of the defendant to show by him that he knew defendant's reputation in the neighborhood for morality, and what it was. *State v. Snover*, 63 N. J. L. 382; *State v. Polhemus*, 65 Id. 387.

The denial of this right was injurious because the defendant was entitled to have all the relevant testimony, including that relating to his good repute, considered by the jury, and if, on such consideration, there existed reasonable doubt of his guilt, even though that doubt be engendered merely by his good reputation, he would have been entitled to an acquittal. *Baker v. State*, 53 *Id.* 45.

We think also that the defendant should have been permitted to show by Dr. Connelly, the police surgeon, what he found to be the physical condition of the prosecutrix after the alleged abuse. Of course carnal abuse does not connote penetration, and hence is not identical with criminal knowledge, that is sexual intercourse, or with rape. *State v. Hummer*, 73 N. J. L. 714. But the prosecutrix's testimony tended to show sexual intercourse, and while this was not essential to conviction, yet if the testimony of the physician had been admitted, and had tended to contradict the prosecutrix, it would have had a legitimate bearing upon the credibility of the prosecutrix as a witness.

We think also that the trial judge erred in overruling this question put on cross-examination of the prosecutrix: "Did you not say to the man in Bayonne, that the man that did bad things, that had intercourse with you, was a man with red hair and red cheeks, and sores on his face?" This question described a man other than the defendant and was put and was competent as affecting the credibility of the witness. *State v. Brady*, 71 N. J. L. 360.

We think also that it was erroneous to permit the state to prove other criminal acts of the accused with others than the prosecutrix.

The general rule on this subject is that upon the trial of a person for one crime, evidence that he has been guilty of other crimes is irrelevant. There are of course certain well-known exceptions to this general rule. They have been stated in *State v. Raymond*, 53 N. J. L. 260, and one of them has been illustrated in *State v. Jankowski*, 82 *Id.* 229. But the testimony as to other crimes in the present case does not fall within any of these recognized exceptions. They were not

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a part of the *res gesta*. There was no logical relation between them and the crime charged except that they may have all resulted from the criminal disposition of the accused, and this cannot, under our legal theory, figure as proof of his guilt. *State v. Raymond, supra.*

Since there must be a new trial, we remark that we find no other errors.

The judgment below will be reversed and a *venire de novo* awarded.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
JAMES McDONALD, PLAINTIFF IN ERROR.

Submitted July 6, 1916—Decided November 13, 1916.

1. To constitute robbery there must be actual violence, or such a demonstration or threats as will create reasonable apprehension of bodily injury if the victim resists.
2. A conviction in a criminal case will not be reversed for error in an instruction which could not have prejudiced the defendant.
3. One indicted for a crime may be convicted of any offence of a lower degree, provided such lower offence is necessarily included in the higher one charged in the indictment.
4. Robbery is larceny with the element of force or fear entering into it.
5. Larceny is a necessary ingredient of the crime of robbery, and a conviction of the former crime may be had under an indictment for the latter.

On error to the Hudson Quarter Sessions Court.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the plaintiff in error, *George E. Cutley*.

For the defendant in error, *Robert S. Hudspeth*, prosecutor of the pleas, and *George T. Vickers*, assistant prosecutor of the pleas.

The opinion of the court was delivered by

TRENCHARD, J. The defendant was indicted for and convicted of robbery, and this review is both by strict writ of error and under section 136 of the Criminal Procedure act.

We think the judgment must be affirmed.

It is contended that there was error in the charge of the court. We think not.

The trial judge charged that—

“To constitute robbery there must be actual violence, or such a demonstration or threats as will create reasonable apprehension of bodily injury if the victim resists.”

That was correct. *State v. Donahue*, 59 *Atl. Rep.* 12.

He further charged in effect that if the evidence of violence or putting in fear was insufficient to establish the existence of those essential elements of robbery, there might be a conviction of larceny if the evidence established the essential elements of the latter crime as defined by the court.

The defendant argues that such charge was erroneous and should lead to a reversal because, he contends, that under the indictment for robbery, there could be no conviction for larceny.

But there are two complete answers to that contention.

First. The jury having found the defendant guilty of robbery, it is manifest that the instruction, even if erroneous, could not have prejudiced the defendant, and hence would not justify a reversal.

Secondly. The instruction was right.

One indicted for a crime may be convicted of any offence of a lower degree, provided such lower offence is necessarily included in the higher one charged in the indictment. *State v. Jackson*, 65 *N. J. L.* 105; *State v. Johnson*, 30 *Id.* 185.

In the *Jackson* case the defendant was convicted of assault and battery under an indictment for carnal abuse, and the conviction was sustained.

In the *Johnson* case the defendant was convicted of an assault under an indictment for rape, and the conviction was sustained, the Chief Justice, in the opinion, remarking in passing that “upon an indictment for burglariously steal-

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ing, the prisoner may be convicted of the theft, and acquitted of the nocturnal entry."

In those cases (Jackson and Johnson) assault was the ingredient offence.

Coming now to the present case, robbery is larceny with the element of force or fear entering into it—that is, robbery is larceny plus.

Larceny is, therefore, a necessary ingredient of the crime of robbery, and a conviction of the former crime may be had under an indictment for the latter.

The conviction in the present case is therefore supported by the indictment.

We have examined all other points made by the defendant both with respect to the charge of the court and refusal to charge, and find no merit in them.

The judgment below will be affirmed.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
HARRY A. VREELAND, PLAINTIFF IN ERROR.

Submitted July 6, 1916—Decided November 22, 1916.

1. The defendant was indicted under section 73a of the Crimes act (*Comp. Stat.*, p. 1770) for desertion and willful refusal or neglect to provide for and maintain his wife and minor child. He had been arrested for carnal abuse and married the complaining witness. At the time, no home having been prepared, the wife acquiesced in an arrangement that she, with their baby (born before the marriage), should go temporarily to the home of her parents and the defendant to his parents. From that time forward the defendant persistently refused to recognize, live with, or provide for and maintain his wife and child, although he had the physical and financial ability so to do. He contributed nothing to their support except to send the wife a money order occasionally for an entirely inadequate sum, although the wife repeatedly called upon the defendant (who lived in the same neighborhood) to begin matrimonial cohabitation and to provide a home and support for her and his child. *Held*, that a motion for an acquittal, upon the ground that a violation of the statute was not shown, was properly refused.

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2. Where a separation is shown to have originated with the wife's consent, it will become desertion from the time the wife makes sincere overtures to terminate it.
3. To constitute desertion upon the part of the husband, it is not necessary that the intent to desert should have been formed at the time of the separation, but it is sufficient if he afterwards determines to desert and persists in such determination.

On error to the Mercer Quarter Sessions Court.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the plaintiff in error, *John A. Hartpence*.

For the defendant in error, *Martin P. Devlin*, prosecutor of the pleas.

The opinion of the court was delivered by

TRENCHARD, J. The defendant below was indicted for and convicted of desertion and willful refusal or neglect to provide for and maintain his wife and minor child.

We are of the opinion that the judgment must be sustained.

At the argument the defendant relied for reversal solely upon the alleged error of the trial judge in refusing to direct an acquittal, urged upon the ground that the evidence did not show a violation of the statute upon which the indictment was founded.

We think that motion was properly denied.

The indictment was founded upon section 73a of the Crimes act (*Comp. Stat.*, p. 1770), which provides that:

"Any husband or father who deserts and willfully refuses or neglects to provide for and maintain his wife or minor child or children, shall be guilty of a misdemeanor," &c.

Now it was open to the jury to find from the evidence, among others, the following matters of fact:

The defendant and his wife were young folks. The defendant had been arrested for carnal abuse and married the complaining witness March 15th, 1915. At the time, no

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home having been prepared, the wife acquiesced in an arrangement that she, with their baby (born before the marriage), should go temporarily to the home of her parents and the defendant to his parents. From that time until the finding of the indictment (February 2d, 1916), the defendant persistently refused to recognize, live with, or provide for and maintain his wife and child, although he had the physical and financial ability so to do. He contributed nothing to their support except to send the wife a money order occasionally for an entirely inadequate sum, although the wife, shortly after the marriage, repeatedly called upon the defendant, who lived in the same neighborhood, to begin matrimonial cohabitation and to provide a home and support for her and his child.

Clearly, in view of such evidence, the motion for an acquittal was properly denied.

The contention that there was no desertion because of the acquiescence of the wife in the separation at the time of the marriage is without merit. The evidence tends to show that it was understood by her to be temporary. Such separation became desertion from the time the wife made sincere overtures to terminate it. *Caffrey v. Caffrey*, 74 N. J. Eq. 834; *Hague v. Hague*, 85 Id. 537.

The argument that it was not desertion, because as defendant contends, there was no evidence of such an intent upon the part of the husband at the time of the separation, is not well founded, either in fact or in law. The evidence tended to show that such an intent was then formed. Moreover, to constitute desertion upon the part of the husband, it is not necessary that the intent to desert should have been formed at the time of the separation, but it is sufficient if he afterwards determines to desert and persists in such determination (*Foote v. Foote*, 71 N. J. Eq. 273), and of that there certainly was ample evidence.

The contention that the evidence showed that the defendant provided for his wife to the best of his ability, is not well founded in fact.

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We have examined all other points made in the defendant's brief and find no merit in them.

The judgment below will be affirmed.

J. FREDERICK BERSTECHEER, RESPONDENT, v. SCALLY
CARUSO, APPELLANT.

Submitted November 20, 1916—Decided December 19, 1916.

1. The supplement of 1916 (*Pamph. L.*, p. 385) to the District Court act, makes no change of the requirement of the act of 1905 (*Comp. Stat.*, p. 1957, pl. 13b) that where there is a stenographer, the transcript shall be certified for appeal within fifteen days after judgment.
 2. The requirement of said supplement of 1916 that the state of the case where there was a stenographer shall be filed in the Supreme Court on or before the opening day of the next term following the date of filing the appeal, refers to the term next after the actual date of filing and not merely after the last day when appeal might have been filed.
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On motion to reinstate appeal.

Before Justices GARRISON, PARKER and BERGEN.

For the petitioner, *Gaetano M. Belfatto*.

The opinion of the court was delivered by

PARKER, J. The appeal in this case was dismissed for want of proper prosecution, and application is now made to reinstate it.

Some confusion was caused in the practice by the apparent inconsistency between the statute requiring, in cases where there was a stenographer in the District Court, that the transcript be certified as the state of the case and transmitted to the clerk of the Supreme Court within fifteen days after the

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judgment (*Pamph. L.* 1905, p. 259; *Comp. Stat.*, p. 1957, pl. 13b) and the statute of 1915, page 549, which enlarged the time of filing notice of appeal and giving bond to twenty days instead of ten, so that if both acts were followed, the transcript would be filed five days before notice of appeal must be given. The time for filing transcript being limited by the statute, this court held that the District Court could not extend it, as in other cases (*Ervin v. Wohlfert*, 76 N. J. L. 430); and we have also held that this court cannot extend it over objection of the appellee.

In this situation the legislature again intervened with the supplement of 1916 to the District Court act (*Pamph. L.*, p. 385), providing that when appeals are taken in cases where there was a stenographer appointed and the testimony certified by the judge as the state of the case, "the party so appealing shall file such state of the case with the clerk of the Supreme Court on or before the opening day of the next term of said Supreme Court following the date of filing said appeal." Turning to the dates material to this application, we find they are as follows:

May 19th, 1916, judgment below.

June 2d, notice of appeal and bond filed.

June 6th, Supreme Court term opened.

June 7th, transcript produced to and certified by judge.

June 8th, the twenty days allowed for taking appeal expired.

It will be observed that although the appellant had until June 8th to take his appeal, he actually did so on June 2d; and that the Supreme Court opened in the interval, on the 6th. It will also be observed that the act of 1916 requires the state of the case to be filed at the beginning of the next term, not after the date when the appeal must be filed, but after it is filed in fact. So that, as we read the act, if appellant had waited until June 8th, or June 7th, or even June 6th, to file his notice of appeal and bond, he would have had until the November term to file his state of the case; but having appealed before the June term opened, the statute fastened on the date when the appeal was taken, and auto-

matically fixed the June term as the one on or before whose opening day, the state of the case was required to be filed.

We have not overlooked the fact that the act of 1916 says "and [when] the transcript * * * shall have been certified by said judge," &c., the state of the case shall be filed by the next term. In this case there was no certificate until the day after the Supreme Court opened; and the supplement of 1916 fixes no time when such transcript must be certified. This seems to leave the act of 1905, *supra*, still applicable to that feature; and that act requires the transcript to be certified within fifteen days after judgment.

As a result, the certificate was due on June 3d, one day after appeal was actually taken, and three days before the term opened; and, with proper diligence, there should have been no difficulty about filing the state of the case in due season. What the result would have been if the judgment had been less than fifteen days before the next term, and appeal had been filed before that term opened, is a question not before us at this time.

As a result, the motion to reinstate the appeal must be denied. The case is, apparently, one of some hardship, on account of the application of statutes which we have no power to relax. There has been much confusion in this class of appeals, due in part to statutory changes made from time to time, and, perhaps, in some cases, without full realization of the effect of such changes; and some injustice necessarily results, which we are powerless to remedy. These are matters to be dealt with by the legislature, either by direct enactment or by authorizing this court to promulgate rules for District Court appeals which will not have the rigidity of statutes, as was done by the Practice act of 1912.

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Jemison v. Tindall.

MARGARET R. JEMISON, PLAINTIFF-RESPONDENT, v.
ENOCH N. TINDALL, DEFENDANT-APPELLANT.

Argued November 8, 1916—Decided December 19, 1916.

1. A parol assignment of a chose in action based on contract, whether such chose in action be evidenced by writing or not, is assignable at law and the assignee may sue thereon in his own name.
2. Plaintiff owed a commission for sale of her real estate under a contract with three persons who acted as her brokers, and paid the whole to one of them who receipted for all. The two others having recovered a judgment against plaintiff, claiming that she was not discharged by such payment, she paid the judgment and took an assignment by parol of their claim against the third. *Held*, that she was entitled to recover back such part of the money originally paid to him as represented the claim of the other two on a division of the commission.

On appeal from the District Court.

Before Justices GARRISON, PARKER and BERGEN.

For the appellant, *Hutchinson & Hutchinson*.

For the appellee, *Aaron V. Dawes*.

The opinion of the court was delivered by

PARKER, J. The appellee, plaintiff below, employed appellant Tindall and two other men named Miller and Cohen, to sell her farm, and agreed in writing to pay them \$300 commission, which they earned by effecting a sale. Mrs. Jemison then paid the commission to Tindall, who receipted both for himself and the others, but concealed from them the fact of payment. Later they learned of it, and instead of bringing suit against Tindall for their shares of the commission, sued Mrs. Jemison jointly and recovered judgment against her for \$200, as for their shares in the amount earned.

The propriety of that judgment is not in question here. Mrs. Jemison paid the judgment, at the same time taking from Miller and Cohen an assignment by parol of their claim against Tindall, and then sued him to recover back so much of the commission as her assignors were entitled to have on a settlement between them and Tindall. This the trial court found was \$150, and gave her a judgment for that amount and interest, from which Tindall appeals.

The principal point urged for the appellant is that the parol assignment was invalid, or at most, enforceable only in equity, but neither branch of this proposition is sound. A chose in action arising out of contract is assignable by parol (*Hutchings v. Low*, 13 N. J. L. 246; *Allen v. Pancoast*, 20 Id. 68; *Sullivan v. Visconti*, 68 Id. 543, 549; *New Jersey Produce Co. v. Gluck*, 79 Id. 115), in which last case the subject of assignment was a right of action on book account, and by section 19 of the Practice act of 1903, choses in action arising on contract are assignable at law, and the assignee may sue thereon in his own name. This is applicable to suits in District Courts. *Comp. Stat.*, p. 1977, § 68.

The other grounds of appeal are either irrelevant or without merit, and the authorities cited in support of them need not be particularly noticed.

The validity of the parol assignment being clear, Mrs. Jemison acquired thereby the rights that Miller and Cohen jointly or severally had to recover from Tindall such part of the commission as they were entitled to under their arrangement with Tindall; or if it be assumed that Tindall had no right to collect the whole commission in the name of the three, and that Mrs. Jemison still remained liable to Miller and Cohen for their shares, she was then entitled to recover back such amount as Tindall was overpaid. In either event the judgment should be affirmed.

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HOWARD REED, PLAINTIFF-RESPONDENT, v. PUBLIC SERVICE RAILWAY COMPANY, DEFENDANT-APPELLANT.

Submitted July 8, 1916—Decided November 8, 1916.

The provisions of paragraph 1 of section 4 of the "Traffic act" of 1915 (*Pamph. L.*, p. 285), requiring every driver of a vehicle approaching the intersection of a street or public road to grant the right of way at such intersection to any vehicle coming from the right, does not impose this duty upon the motorman of a street car.

On appeal from the District Court.

Before Justices GARRISON, PARKER and BERGEN.

For the respondent, *John Warren*.

For the appellant, *Leonard J. Tynan* and *Joseph Coult, Jr.*

The opinion of the court was delivered by

PARKER, J. The question to be determined is whether paragraph 1 of section 4 of the "Traffic act" of 1915 (*Pamph. L.*, pp. 285, 289), providing that "every driver of a vehicle approaching the intersection of a street or public road shall grant the right of way at such intersection to any vehicle coming from his right" is binding upon the motorman of a street car.

The circumstances giving rise to the suit were that as a trolley work car with a trailer was moving southward along Monticello avenue in Jersey City, an automobile came eastward out of Jewett avenue, an intersecting street, and was struck by the trolley car while crossing in front of it.

The court charged the jury that if they should find that "both vehicles reached the intersection at the same time, that the vehicle on the right (the automobile) had the right of way." This was excepted to and repeated in a slightly different form and another exception noted.

If a street car is not a "vehicle" in the intendment of the statutory language quoted, the instructions complained of were erroneous, because unless the statute applies, the common law rule laid down in *New Jersey Electric Railway Co. v. Miller*, 59 N. J. L. 423, would control the situation. That rule is that the driver of the automobile would have the right of way if proceeding at a rate of speed which under the circumstances of the time and locality, was reasonable, he should reach the point of crossing in time to go safely upon the tracks in advance of the approaching car, the latter being sufficiently distant to be checked, and if need be, stopped before it should reach him. See also *Weinberger v. North Jersey Street Railway Co.*, 73 Id. 694; *Peterpolo v. Public Service Railway Co.*, 81 Id. 390.

The lengthy title of the act in question states that it is for the "regulation of vehicles, animals and pedestrians on all public roads and turnpikes." At the outset it defines a "vehicle" as including "equestrians, led horses and everything on wheels or runners, except street railway cars and baby carriages, unless otherwise specified." This specific exception is fortified by the definition of the word "driver" in the next paragraph (section 1, subsection 2), as including "the rider or driver of a horse, bicycle or motorcycle, and driver or operator of a motor vehicle, unless otherwise specified." The exclusion of street cars from the category of vehicles is further indicated by paragraphs immediately following, requiring that a vehicle shall keep to the right; a vehicle meeting another shall pass to the right; a vehicle overtaking another shall pass on the left side, and the vehicle overtaken shall bear to the right; a vehicle turning into another road to the right shall turn the corner as near to the right-hand boundaries of the road as possible. Several similar provisions follow, all equally inapplicable to street cars; it is useless to multiply the quotations. Paragraph 10 contains specific provisions as between "vehicles" and street cars *eo nomine*, pages 287, 288.

The only provision we find that gives any plausibility to the claim that subsection (1) of section 4, relating to vehicles

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coming from the right, was intended to control street cars coming from the left, is subsection (2) of the same section 4, which reads as follows:

"(2) Subject to subsection 1 of this part, street cars shall have the right of way between cross roads or cross streets over all other vehicles, and the driver or person in control of any vehicle proceeding upon the track in front of the street car shall immediately turn out on signal from the motorman or person in control of the street car."

It may be argued that the clause, "subject to subsection 1 of this part," indicates that the legislature meant subsection 1 to apply to street railroad cars; but this construction cannot be put upon it without doing violence to all that has gone before wherein street cars and vehicles are treated as different things. In fact, subsection (2) gives street cars the right of way between cross streets and the troublesome clause is only a limitation of that right.

What is evidently meant is that the duty of a vehicle in front of a car to turn out is modified by the possible exigency of meeting another vehicle coming from the right and entitled to the right of way over it.

The instruction complained of was erroneous and for this error there must be a reversal and a new trial.

THE STATE, DEFENDANT IN ERROR, v. GEORGE T. BACHELLER, PLAINTIFF IN ERROR.

Argued June 7, 1916—Decided October 14, 1916.

The refusal of a motion to direct a verdict of acquittal at the close of the case for the state, where the case fails to show the defendant's guilt, is an error reviewable under sections 136 and 137 of our Criminal Procedure act, and the right to the review is not waived by the defendant because he thereafter proceeds with his defence.

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On error to the Camden Court of Quarter Sessions.

Before Justices GARRISON, PARKER and BERGEN.

For the plaintiff in error, *Wilson & Carr* and *Robert H. McCarter*.

For the defendant in error, *William J. Kraft*.

The opinion of the court was delivered by

BERGEN, J. The defendant was convicted in the Camden County Court of Quarter Sessions of the crime of forgery. The record has been brought here by a writ of error, and also contains the proceedings had at the trial as permitted by sections 136 and 137 of the Criminal Procedure statute, and the principal ground urged for reversal is the refusal of the trial court to direct an acquittal at the close of the case for the state.

If this action resulted in a manifest wrong or injury to the defendant he is entitled to a reversal. *State v. Jagers*, 71 N. J. L. 281; *State v. Lieberman*, 80 Id. 506. It is urged by the state that even if this judicial action was erroneous the defendant waived his benefit by proceeding with his defence, during which, it is claimed, the defendant by his testimony supplied the deficiencies, if any, in the state's case.

In the case of *Burnett v. State*, 62 N. J. L. 510, Mr. Justice Collins, speaking for the Supreme Court, expressed his opinion, not necessary to the decision of the case, for it was disposed of on another ground, that although the defendant was entitled to a ruling at the close of the state's case, he waived an exception to its denial by proceeding with his defence, but our Court of Errors and Appeals did not consider such a course a waiver in *State v. Jagers*, *supra*, where defendant's exception to a refusal to direct an acquittal at the close of the case for the state was considered and determined, although after such refusal the defendant proceeded with his defence, and the same course was followed in this court in *State v. Lieberman*, *supra*.

In the Jagers case Chancellor Magie, speaking for the Court of Errors and Appeals, after declaring that the court was required, under section 136 of the Criminal Procedure act, to consider whether the plaintiff in error has suffered manifest wrong or injury in the denial of any matter by the trial court, which was a matter of discretion, said: "The provision for review of a denial of a motion to discharge or to direct a verdict of not guilty, which is addressed to the discretion of the court, brings into review only the question whether, *upon the evidence as it stood when the motion was made*, there was a case for the jury."

It cannot be assumed that so learned a jurist overlooked the fact that after the denial of the motion the defendant proceeded with his case, or, that, if this latter circumstance amounted to a waiver of the defendant's rights, it would not have been so adjudged, and the review would not have been limited to the question whether, upon the evidence as it stood when the motion was made, the defendant was entitled to the benefit of his exception. In the Lieberman case, Chief Justice Gummere, speaking for this court, said: "Under the provision of section 136 of the Criminal Procedure act a court of review is required to consider, among other things, whether the defendant has suffered manifest wrong or injury in the denial of any matter by the trial court, which was a matter of discretion. This provision applies to a refusal to direct a verdict at the close of the state's case, but it brings into review only the question whether, upon the evidence as it stood when the motion was made, there was a case for the jury."

In neither of these cases was the testimony of the defendant considered, and from them it appears that in cases governed by the sections of our Criminal Procedure act above mentioned, a defendant is entitled to the benefit of a review of an erroneous refusal to direct a verdict of acquittal at the close of the state's case, and that an exception to such ruling is not waived by the defendant because he proceeds with his defence. This is a just rule, for the policy of the law is against compelling a person charged with a crime to prove his innocence until the state has made a case from which guilt

may be inferred. There is no such thing as a nonsuit in a criminal case, and, at the close of the state's case, there must be evidence from which an inference of guilt may be drawn or the defendant is entitled to an acquittal, as a matter of law, and that legal right will not be presumed to be waived because he proceeds with his defence.

The practice that obtains in civil trials of considering defendant's testimony upon review of the denial of his motion to nonsuit affords no criterion as to criminal trials, for its history and theory are entirely different. In civil trials the practice of compulsory nonsuits, not being derived from the common law, was *sui generis* in this state, and in the early days the rule adopted was that such a motion, although made at the close of the plaintiff's case, would not be decided until the defendant had rested his case.

This practice became so unpopular with the bar that it led to the compromise rule, as we now have it, by which the motion is decided before the defendant opens his case, but, on a review of its denial, the defendant's testimony will be considered if it supports the ruling against him. *Perth Amboy Manufacturing Co. v. Condit*, 21 N. J. L. 659; *Voorhees v. Woodhull's Executors*, 33 *Id.* 482; *Delaware, Lackawanna and Western Railroad Co. v. Dailey*, 37 *Id.* 526.

The parallel motion in criminal cases has no such history, or *raison d'être*, because the motion at the close of the state's case was not reviewable until made so by the one hundred and thirty-sixth section of the Criminal Procedure act. Moreover, the application of the civil rule to criminal trials is open to the criticism that by force of a ruling, that was wrong when made, testimony that the defendant ought not to have been required to give at all may be laid hold of to sustain the wrongful ruling by which he was required to give it. This comes perilously near compelling the accused to convict himself, since under the practice thus sanctioned the defendant's motion made when no case had been made against him may be denied, with the result that the defendant, at his peril, must either forego making any defence on the merits, or else make such defence at the risk of having isolated pieces of his

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testimony used against him to cure an exercise of discretion, wrongful when made, which the legislature has given him the right to review, and which our courts have said was to be reviewed, "upon the evidence as it stood when the motion was made." We consider that a wrongful exercise of discretion having these results is a manifest wrong and injury to the defendant in the sense intended by the statute.

We therefore proceed to consider the question whether at the close of the case made by the state there was a case for the jury, without considering the facts developed in the defendant's case tending to cure, if they justify such inference, the absence of proof of defendant's guilt when the motion for a direction was made.

The case made by the state was that defendant solicited Pelouze & Campbell, a partnership, consisting of two persons conducting business under that name, to enter into a contract with the Jersey Railways Advertising Company for advertising the business of the firm in certain street railway cars, which resulted in an agreement to have the advertising cards of the firm placed in certain cars for the period of six months; that a printed agreement was furnished by the defendant with a space left blank in which to insert, before the printed word "months," the period agreed upon; that in this space the defendant inserted the figure "6," after which the firm signed the contract and delivered it to the defendant to forward to the advertising company for approval, without which the contract was not complete; that the contract was executed in duplicate, one copy to be returned to the firm, if approved, and the other retained by the advertising company; that one of the duplicates was returned to the firm duly approved, shortly after which they discovered that a cipher had been inserted after the figure "6," making the term read 60 months; that no protest was made against the alleged alteration until the advertising company demanded payment, about eight months after the alteration was discovered. There was no direct proof that defendant made the alteration, or that it was made in Camden county by anyone.

In our opinion, this testimony does not establish two important elements necessary to show defendant's guilt and overcome the presumption of innocence to which every one charged with a crime is entitled—*first*, that he altered the contract after its execution, or *second*, that if he did, it was done within the jurisdiction of the Camden County Quarter Sessions.

It is not claimed that defendant kept the contracts in his possession or delivered them after execution and alteration, but the contrary is the fact, for they were returned to the firm from the New York office without the intervention of the defendant, and if altered, may have been by some one other than defendant and without his knowledge. The difficulty of showing criminal guilt does not relieve the state from that obligation, and there is no presumption of guilt. There was no proof when the motion was made, from which an inference could be drawn that this defendant forged these contracts by altering their terms, or that it was done in Camden county.

The presumption is that he did what he agreed to do, and that was to forward both contracts to the home office for approval in the condition in which they were delivered to him, and that he did send them is not denied, but the state insists that the presumption is that the defendant made the alteration before sending them. This requires an assumption that the defendant committed a crime, without proof from which it can legitimately be inferred. The only proof was that the defendant received the contracts in one condition, and that they were returned to the firm by a third person in an altered form.

This is no proof of a criminal act by the defendant, either in Camden county or elsewhere. The alteration may have been made in Newark or New York City. The judgment of conviction is erroneous and should be reversed.

As this case will have to be re-tried we feel called upon to refer to a matter which occurred at the trial, the tendency of which was to deprive the defendant of the benefit of documentary proof presumably within the control of the state or

at least of the complaining witness. It appears that a few weeks prior to the making of the contract which it is alleged the defendant altered after its execution by changing its terms from six months to sixty months, the complaining witnesses had made at the solicitation of the defendant a contract for advertising on certain car lines; that the contract in question was drawn to take the place of the former contract by including the original car lines with another, the effect of which was to entitle the complaining witnesses to advertising in additional lines of cars. The defendant claims that the first contract was for sixty months and gave the state notice to produce that contract, of which the defendant had a duplicate.

It was very important for the defendant to have that contract produced, for, although he had a copy, it would be very persuasive evidence that the new contract for substantially the same subject-matter was sixty months, if the duplicate of the former contract was for the same period. And while the defendant had a copy, it would not be as conclusive on the question of the complaining witnesses' knowledge as the one that they had in their possession.

They admitted that there was such a contract but denied that it was for sixty months, and if in fact it was for sixty months it would have tended to discredit their testimony as to the term for which the disputed contract was drawn.

Neither the complaining witness or the state produced this contract, and the reasonable inference is that it was drawn for sixty months, as was the copy produced by the defendant. Defendant gave notice to the state to produce this duplicate and was manifestly surprised at its non-production.

We think that defendant was entitled to its production in aid of his defence if within the control of the state.

The judgment is reversed.

Vollmer v. Wachlin.

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FREDERICK VOLLMER, JR., ET AL., RELATORS, v. AUGUST WACHLIN, RESPONDENT.

Argued November 8, 1916—Decided December 21, 1916.

At an election held in a municipality to determine whether it would adopt an act providing for a different form of government, a majority of the votes cast favored the adoption but the act only became operative if the votes cast in favor of the act equaled at least thirty per centum of the total number of legal ballots cast in the municipality at the last general election for members of assembly. The votes cast in favor of the adoption did not equal the thirty per centum required, so that the act did not become operative. The statute further provided that if a majority of the votes cast were not in favor of the act then it should remain inoperative and no further proceedings should be taken until after the beginning of the last year of the term of the mayor elected following the rejection of the act, after which another election could be had. *Held*, that where a majority of the votes were cast in favor of the adoption of the act, it did not become operative because it failed to receive the thirty per centum of the votes cast at the last general election, the limitation concerning another election did not apply because that condition is only applicable when a majority of the votes are not cast in favor of the adoption.

On demurrer to alternative writ of *mandamus*.

Before Justices GARRISON, PARKER and BERGEN.

For the relators, *George J. McEwan*.

For the respondent, *John J. Fallon*.

The opinion of the court was delivered by

BERGEN, J. The question presented requires the construction of an act entitled "An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by boards of commissioners or improvement commissions in this state," as amended in 1915. *Pamph. L.*, p. 12.

Under this statute an election was held in the town of West Hoboken to determine whether it would adopt it, and at that election a majority of the votes cast favored the adoption, but the number cast in its favor did not equal at least thirty per centum of the total number of legal ballots cast in such town at the last general election for members of assembly, immediately preceding the submission of the act. Thereupon a new petition was prepared and presented to the clerk of the town who refused to receive and file the same or to call another election, and the relators applied for and were allowed an alternative writ of *mandamus* requiring the respondent as town clerk to accept and file the petition, and to forthwith call another election for the same purpose, or show cause to the contrary.

The return made by the respondent to this writ set up such former election and that the act failed of adoption, although it received more than a majority of those voting at the election, because the votes cast in its favor did not equal at least thirty per centum of the total number of legal ballots cast at the last general election for members of assembly, and therefore no other election could be called until after the beginning of the last year of the term of the mayor elected at the election following the first election under this act. The relators now move to strike out the return, but it was consented to by both sides on the argument that the matter be disposed of as if on demurrer to the return, that being conceded to be the proper practice, and counsel also waived all questions but this, viz., does the statute prevent the holding of another election forthwith, or at any time, earlier than it could be held if a majority had voted against the adoption of the act?

The answer to this question depends upon the construction to be given to section 18 of the statute which provides that the act shall take effect immediately, but its provisions remain inoperative until assented to by a majority of the legal voters of the municipality voting at an election, to be held therein, called by the municipal clerk upon the petition in writing of twenty per centum of the persons qualified to vote at the

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last general election; that the results of any election so held shall be reported by the election officers to the municipal clerk, whose duty it is to certify such results to the legislative body of such municipality, the same to be entered in the minutes of such body and certified by the clerk to the secretary of state, whereupon, if it appears by the said certificate of the municipal clerk "that the majority of the votes cast are in favor of the adoption of this act, this act shall in all respects become and be operative in such city, and binding upon the inhabitants thereof and upon all persons and property to be affected thereby; provided, however, that the votes cast in favor of the adoption of this act be equal to at least thirty per centum of the total number of legal ballots cast in such city at the last general election for members of assembly immediately preceding the submission of this act."

The statute further provides, "If a majority of the votes cast are not in favor of the adoption of this act, then the provisions of this act shall remain inoperative and no further proceedings shall be taken until after the beginning of the last year of the term of the mayor, or equivalent officer, elected at the election following the rejection of this act, after which date, upon the presentation of another petition or request, as provided for herein, the same procedure shall be had and the question of the adoption or rejection of the provisions of this act again submitted in the manner herein set forth with the same force and effect."

Under the plain language of this statute the limitation is only applicable when a majority of the votes cast are not in favor of the adoption of the act, and except for this there is no limitation upon the time within which another election may be called.

In the present case a majority of the votes were cast in favor of the adoption of the act, and there is nothing in the statute which limits the holding of another election, when a majority of the votes are cast in favor of the adoption of the act. The statute does not apply the limitation relating to a second election simply because the result prevents the statute from becoming operative because of the failure of the

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attendance of a sufficient number of favorable voters to equal thirty per cent. of those cast at the next prior election for members of the general assembly. All that the statute provides is that if a majority of the votes cast are not favorable to the adoption of the act, then no further proceedings shall be taken until the expiration of the time fixed. The limitation applies when the votes cast in favor of the adoption are not a majority of all those voting, and not where the act remains inoperative because the votes cast in its favor do not equal the required thirty per centum.

The demurrer should be overruled and the relator awarded a peremptory writ of *mandamus*. As the respondent is a city officer, and the question whether the municipality he represented should be put to the expense of another election, raised a fair ground of controversy, we think that no costs should be allowed to the relator.

DANIEL H. V. BELL, PROSECUTOR, v. CITY OF ATLANTIC CITY ET AL., DEFENDANTS.

Submitted July 6, 1916—Decided November 10, 1916.

The prosecutor was appointed to the office of city clerk of Atlantic City, for one year at a stated salary, and held the office without reappointment for three years, when he was superseded by another. He contests the legality of the appointment of his successor upon the ground that, being a veteran of the Spanish-American war, he cannot be removed under the provisions of the act of 1907, chapter 14, without good cause, and after a fair and impartial hearing. *Held*, that the act of 1907 applies only to officials holding an office, whose term was not fixed by law at the time of the passage and approval of the act.

On *certiorari* removing resolution of commissioners.

Before Justices SWAYZE, MINTURN and KALISCH.

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For the prosecutor, *Theodore W. Schimpf*.

For the defendants, *Harry Wootton*.

The opinion of the court was delivered by

MINTURN, J. The writ of *certiorari* in this case brings up for review a resolution passed by the commissioners of Atlantic City removing the prosecutor from the office of city clerk and appointing another in his place. The contention of the prosecutor against the validity of this action is based upon the fact that he is an honorably-discharged veteran of the Spanish-American war, and as such is entitled under the Veteran act (*Pamph. L.* 1907, p. 37) to serve in the position from which he was removed until, in the language of the act, he shall be removed "for good cause shown after a fair and impartial hearing." That act, however, contains a qualifying feature which presents the real inquiry upon this writ, *i. e.*, the veteran who may claim the benefit of its provisions must be the occupant of an office or position "whose term of office is not now fixed by law."

It is important to inquire, therefore, whether at the time of the enactment of the legislation invoked the term of office of the city clerk was fixed by law, for obviously if it was, the prosecutor does not bring himself within the terms of the act. The city is governed by the provisions of "An act relating to, regulating and providing for the government of cities," approved April 3d, 1902. *Pamph. L.*, p. 284. The second section of the act provides for the appointment of a city clerk and fixes his term of office at three years.

Subsequent legislation applicable to the city enabled the commissioners to appoint a city clerk "for such-term as they may fix." *Pamph. L.* 1911, p. 462; *Pamph. L.* 1912, p. 643. The commissioners, on July 16th, 1912, adopted a resolution providing for the appointment of a city clerk for the term of one year, and fixing his salary. At a meeting, held on July 30th, 1912, the prosecutor was appointed to the office and the salary by another resolution was increased. No change was made in the office until May 16th, 1916, when

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another resolution was passed providing for the election of a city clerk and fixing his salary.

At that meeting a successor to the prosecutor was appointed.

We think that this legislation, and the municipal action taken thereunder, created an office with a fixed term, and that the prosecutor cannot invoke the Veteran act to maintain his tenure. *Gilhooly v. Freeholders*, 43 Atl. Rep. 569.

The legislation referred to manifestly was intended to enable the commissioners to fix the term of office, and the resolutions adopted by the commissioners in pursuance thereof leave no doubt that they availed themselves of the power so conferred.

The act of 1902 fixed the term at three years, and the only change worked by the subsequent legislation was to leave the duration of the term optional with the commissioners, and in either event the term of office was fixed.

If it be contended that the latter legislation was subject to the provisions of the Veteran act, upon the theory that such was the legislative intent, the answer is that the Veteran act expresses its own limitation, and applies only to offices whose terms were not fixed by law at the time of the passage and approval of the act.

The passage of the resolution creating the office and fixing the term of city clerk was tantamount to a law, and, obviously, was operative as such within the municipality. *Hardy v. Orange*, 61 N. J. L. 620.

In any event, we cannot give to the act in question, in the absence of a clear legislative intent to that end, a construction which in effect would annul the power vested in the commissioners by the acts under which they are constituted and which contemplate the appointment of officials for fixed terms.

The case of *Stewart v. Freeholders*, 61 N. J. L. 117, is not analogous. There the prosecutor held a position only, and it was held that such a place did not come within the language of a statute, which fixed the terms of officers only. Here the

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commissioners had the undoubted power to fix the term of the office in question.

The result is that the resolution under review will be affirmed.

LAWRENCE MAXWELL ET AL., EXECUTORS, &c., PROSECUTORS, v. EDWARD I. EDWARDS, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, ET AL., DEFENDANTS.

Argued June 6, 1916—Decided November 29, 1916.

1. The Inheritance Tax law (*Pamph. L. 1909, p. 325*), as amended (*Pamph. L. 1914, p. 267*), is a succession and not a property tax, and does not violate any provision of the federal or state constitutions intended to secure equality of rights.
 2. The act of April 9th, 1914 (*Pamph. L., p. 267*), amending the Inheritance Tax law (*Pamph. L. 1909, p. 325*), if discriminatory at all, discriminates when considered with cognate legislation in favor of the non-resident, and, although it does not produce absolute equality; it is a workable rule, and a step in the evolution making for practical equality of taxation in so far as such equality can be evolved under our dual system of government, and is therefore valid.
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On writ of *certiorari* removing state tax.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Coult & Smith*, and *Edward DeWitt*, of New York.

For the state, *John W. Wescott*, attorney-general, and *John R. Hardin*.

The opinion of the court was delivered by

MINTURN, J. The writ is intended to review an assessment of a transfer tax, imposed by the state comptroller, upon

certain personalty in this state, of which James McDonald, a non-resident, died possessed.

The property in question consists of certain stocks in the Standard Oil Company, and in six other New Jersey corporations, valued in the aggregate at \$1,114,965. The deceased died in the District of Columbia, leaving a last will and testament, and a codicil, which were duly admitted to probate, and letters testamentary granted thereon in that district to Lawrence Maxwell of Ohio, and the Fulton Trust Company of New York, a corporation organized under the laws of that state, who have qualified as executors. The beneficiaries named in the will were at the time of testator's death non-residents of this state. The total amount of the state tax imposed was \$29,071.68, the legality of which assessment is the subject of this litigation.

The tax was imposed in pursuance of chapter 228 of the laws of 1909, as amended by chapter 151 of the laws of 1914. A subsequent amendment was passed in 1915 (*Pamph. L.*, p. 745), but was not effective or in operation at the time of the death of the testator, and therefore has no bearing upon this issue.

The act of 1909 was the original act dealing with the subject-matter of this contest, and presents in its title a clear statement of the legislative intent, "An act to tax the transfer of property of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale in certain cases."

It is insisted that in imposing the tax the decisions of the New York courts construing a statute substantially similar in verbiage to the act in question, should have been followed by the comptroller. This contention, however, has been dealt with by this court in *Hopper v. Edwards*, in an opinion by Mr. Justice Trenchard, and quite recently in *Torrance v. Edwards*, in an opinion by Mr. Justice Kalisch, both adjudications being adverse to the claim urged here. That question therefore may be disposed of upon the doctrine of *stare decisis*.

The effect of the legislation under consideration has been determined by this court, and the Court of Errors and Appeals

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in a series of cases in which its legality was attacked from various aspects, with the result of sustaining it as a legislative effort to impose a succession as contradistinguished from a property tax. It is further deducible from these decisions that this legislative power, when not exerted in an arbitrary or capricious manner, or in disregard of fundamental rights, does not contravene any inhibition intended to secure equality of rights contained in the provisions of the federal or state constitutions. *Neilson v. Russell*, 76 N. J. L. 27; *S. C. (Court of Errors and Appeals)*, *Id.* 655; *Sawter v. Shoen-thal*, 83 *Id.* 499; *Carr v. Edwards*, 84 *Id.* 667; *Beers v. Edwards*, *Id.* 32; *Senff v. Edwards*, 85 *Id.* 67; *Hopper v. Edwards*, 88 *Id.* 471; *Howell v. Edwards*, *Id.* 134.

The inquiry presented by this controversy is not any criticism of these fundamentals, but resolves itself entirely into a criticism of the legal effect of the amendment of 1914, in its effort to reach the estates of non-resident decedents, by the method provided in section 20 of the act, which is as follows: "A tax shall be assessed on the transfer of property in this state of a non-resident decedent, if all or any part of the estate of such decedent wherever situated shall pass to persons or corporations taxable under this act, which tax shall bear the same ratio to the entire tax, as the said estate would have been subject to under this act, if such non-resident decedent had been a resident of this state, and all his property, real and personal, had been located within this state, as such property within this state bears to the entire estate wherever situated, provided that nothing in this clause contained shall apply to any specific bequest or devise of any property in this state."

The clear intent of this legislation, it has been determined, is to provide a mathematical formula to the estate of a non-resident decedent, which in practical application will work out a tax not on the entire estate of the decedent, but upon that portion of it within the jurisdiction, so as to practically equalize in administration the tax imposed by the same legislation upon the estates of resident decedents.

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That this object may be adequately and legally attained by this legislative method is evidenced by the authorities.

The method in question doubtless had its origin in an intimation contained in the opinion of Mr. Justice Swayze in *Beers v. Edwards, supra*, in commenting upon the act of 1909, wherein he declared: "We do not mean to say that the legislature might not have adopted another basis for the computation of the entire tax. It might perhaps have enacted that the entire tax should be the amount to which the estate would have been subject, if the decedent had been a resident of New Jersey, and all his property had been situated here."

Referring to the same subject in the subsequent case of *Carr v. Edwards, supra*, in the Court of Errors and Appeals, he declared: "The object and the effect of section 12 was to equalize the rate of the transfer tax as between the estates of resident and non-resident decedents. The amount (of the tax) depends on the ratio of the New Jersey property to the entire estate wherever situated. This, however, merely affords a measure of the tax imposed; the tax is still by the very words of the section imposed upon the property located within the state."

This method of dealing with the estate of non-residents found within the state was earlier supported by the views of Mr. Justice Reed in *Tilford v. Dickinson*, 79 N. J. L. 302, in dealing with the legislative *modus operandi* imposed by the Tax act of 1906. This method of taxation was also dealt with by Mr. Justice Kalisch, in this court, in *Howell v. Edwards, supra*, and its validity was there recognized and subsequently was the subject of consideration, and was practically applied by this court in the recent opinion by Mr. Justice Kalisch in *Torrance v. Edwards, post p. 507*. Pursuit of the subject further from the viewpoint of legality and reasonableness under the constitutional inhibitions, of this legislative method of equalizing taxation, as between the estates of resident and non-resident decedents, might appear to be but an academic task in the light of these adjudications, but it may not be out of place to observe in passing, that the principle of this legislation has met with

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the approval of the highest courts in other jurisdictions where the question has been presented for judicial determination. *Adams Express Co. v. Indiana*, 165 U. S. 255; *Adams Express Co. v. Ohio*, *Id.* 195; *Adams Express Co. v. Kentucky*, 166 *Id.* 171; *St. Louis and W. Railway Co. v. Arkansas*, 235 *Id.* 350.

The general power of the state to enact legislation of this character, and its impregnability to attack on constitutional grounds, is amply emphasized and vindicated by Mr. Justice Pitney in *St. Louis and W. Railway Co. v. Arkansas*, *supra*, wherein he declares: "Nothing in the fourteenth amendment imposes any iron-clad rule upon the states with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions." There remains therefore to consider only the concrete objection presented by the prosecutor, in the form of various reasons to this method of taxation; the contention being that in the case *sub judice* its application results in inequality to this particular estate.

It must not be overlooked in any calculation, that as our legislation now stands, the non-resident decedent is accorded a favored status, since he is exempted in the succession tax from any imposition upon bonds and mortgages, commercial paper, bank deposits and debts, within this state, which taxable assets are subject to taxation as assets of a resident decedent. *Hopper v. Edwards*, *ubi supra*. Mention of this consideration is suggested to evince the fact which at once must become apparent, that instead of subjecting the non-resident's estate to an arbitrary and discriminative tax, the legislation in question, if discriminatory at all, is obviously so only in favor of the non-resident. That such legislation may eventuate differently in results in specific instances, when compared with the results attainable in the case of the resident decedent, presents no legal ground for its condemnation. The never ending aim of popular government, and the age-long dream of the political economist, have been the evolution of a golden rule productive of equality of taxation. In this

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as in many other fields of human endeavor, it must be manifest that the perfect is in reality the unattainable.

That the ratio rule applied in this case may not produce absolute equality in results may be conceded, but it will answer its purposes in the complicated relationship of our state and federal life, if it be a business-like workable rule, manifestly the latest solution in the line of judicial and legislative thought upon one of the most abstruse problems of modern government.

It may well be that the tax ratio in actual application in this instance may, as exemplified by the prosecutor's method of computation, produce a result different from that which will be obtained under the method applicable to the estates of resident decedents; but as we have observed, that fact does not furnish the determining test as to the validity of this legislative scheme, nor does it prove the absence of the necessary constitutional element of equality, as that term has been defined by the adjudged cases. "It is," says the learned editor and commentator of the *Cyclopedia of Law and Procedure*, "a matter of common experience that absolute equality in the imposition of a tax is not attainable, nor is this the meaning of the constitutional provision. All that it requires is an aim and intention on the part of the legislature in framing the tax law to approximate to the ideal of absolute equality, as closely as the nature of the subject and the necessities of practical administration will permit. Hence the courts will not pronounce a statute invalid on this ground, unless it appears that it was framed on a plan or principle not calculated to produce equality and uniformity, or that its administration will result in such flagrant injustice as to evidence an entire disregard of the constitutional requirement." 37 *Cyc.* 736, and cases cited.

Our examination of the computation of the tax made by the comptroller, in this instance, satisfies us that it was made in accordance with the ratio provision of the act of 1914, and that it should for the reasons here presented be sustained.

The tax in question will therefore be affirmed.

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RINGWALT LINOLEUM WORKS v. THERESA LIQUOR ET AL.

Submitted July 6, 1916—Decided November 10, 1916.

Where a petition was filed under the Workmen's Compensation act, and a day was thereafter fixed for hearing by the court, and the hearing was continued by an order regularly entered until June, 1914, and nothing further was done thereafter until September 25th, 1915, involving a period of over twelve months, when an order was made fixing a day for hearing—*Held*, that the proceedings under the act are intended to be of a summary nature, and the failure of the petitioner to move the hearing during the interim, warranted the defendant in concluding that the proceeding had been abandoned, and the order fixing a day under the circumstances is set aside.

On *certiorari* removing an order of the Middlesex Common Pleas.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Bedle & Kellogg*.

For the defendants, *George L. Burton*.

The opinion of the court was delivered by

MINTURN, J. The writ is intended to review an order of the Middlesex Pleas respecting the trial of a case under the Workmen's Compensation act between the parties hereto.

The difficulty presented arises from the failure of the parties to enter upon the record the various orders of continuance. The petition was filed on January 27th, 1914, and an order was thereafter made fixing February 20th, 1914, for the hearing. The trial was thereafter continued by orders regularly entered until June 2d, 1914. A lapsus is then presented until September, 1915, during which interim no action was taken by either party, and no further order was entered. Upon the latter date the Common Pleas, against the objection

of the prosecutor, made an order fixing September 25th, 1915, as the day for hearing, and the present writ was allowed to review the legality of that order.

Upon this proceeding we are concerned only with the record of the Common Pleas removed by this writ. *Moore v. Hamilton*, 24 N. J. L. 532.

If that record be deficient in any respect it is within the province of either party to allege diminution and supply the deficiency. The certified record shows no entry of an order of continuance during the period to which reference has been made, and our consideration of the case must be based upon the status thus presented.

The proceedings under review are statutory in their origin and are intended to be summary in their nature and conduct. *Bauer v. Common Pleas*, 88 N. J. L. 128.

The twentieth section of the Workmen's Compensation act provides that after the filing of the petition the judge of the Common Pleas shall fix a time and place for hearing, not less than three weeks after the date of filing the petition, and requires him to file his determination within thirty days after final hearing. It is further provided that "at the time fixed for hearing, or any adjournment thereof," the judge shall hear the witnesses, and "in a summary manner decide the merits of the controversy."

The manifest and clear intent of the act is to secure that inexpensive and expeditious determination of the controversy, which theretofore was claimed to be a fatal defect in existing legal procedure.

The procedure followed in the case at bar obviously violates the spirit of the act. The proceedings being entirely statutory, it was incumbent upon the petitioner to present her case upon the day fixed for hearing, or to continue it by stated adjournments in regular manner upon the records of the court, either by consent of the defendant or by an application made upon notice to the other side, so that the defendant would have notice of the proceeding, and be cognizant of the status of the case. To countenance this applica-

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tion after twelve months have expired since the last regular step was taken in the proceeding is, in effect, to ignore the very purpose of this legislation, and to give to the party in laches an advantage which he could not have attained under legal procedure as it existed anterior to this enactment. *Wolf v. Watson Stillman Co.*, 79 N. J. L. 284.

There is always, of course, the consideration to be noted in such a situation as is presented by this record, that the adverse party deeming the proceeding to have been abandoned may find it difficult, if not entirely impracticable, to procure the witnesses to the controversy, who, when the petition was filed, may be presumed to have been readily accessible. These considerations lead us to conclude that the order brought up for review must be set aside.

MICHAEL M. WYGANT, PROSECUTOR, v. HACKENSACK
IMPROVEMENT COMMISSION, RESPONDENT.

Submitted June 29, 1915—Decided August 10, 1916.

1. The act of 1914 (*Pamph. L.*, p. 422), empowering any municipality, governed by a board of commissioners or improvement commission, to establish a full-paid or part-paid fire department, is unconstitutional, in that by its limitation a department of public service, common to all municipalities, and in nowise peculiar to any specific municipality, is delimited in use to a particular class of municipality, and the act is a special and local law in that respect.
2. The ordinance under review, creating a part-paid fire department in Hackensack, while not valid under the act of 1914 (*Pamph. L.*, p. 422), may be sustained because authorized under the provisions of an act approved March 9th, 1882 (*Pamph. L.*, p. 80; *Comp. Stat.*, p. 5501).

On writ of *certiorari* removing ordinance and resolution.

Before Justices PARKER, MINTURN and KALISCH.

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For the prosecutor, *James S. De Turck*.

For the respondent, *Arthur Van Buskirk* and *Wendell J. Wright*.

The opinion of the court was delivered by

MINTURN, J. The writ is intended to review two ordinances passed by the Hackensack Improvement Commission, and certain resolutions passed thereunder, resulting in the appointment of William Ziegler, as chief of the fire department, as against the prosecutor, who was an unsuccessful candidate for the position.

The insistence of the prosecutor is that while he failed to obtain the appointment, another competitor, one Livock, was entitled to receive the same, and upon that theory the prosecutor sued out this writ as a taxpayer. The defendant was incorporated by special act of the legislature in 1868 (*Pamph. L.*, p. 564), and to it were conceded *inter alia* certain corporate powers theretofore vested in the inhabitants of the village of Hackensack. In 1914, an act was passed which empowered any municipality governed by a board of commissioners or improvement commission, to establish a full-paid or part-paid fire department. *Pamph. L.*, p. 432.

Pursuant to the powers contained in this act, the defendant passed an ordinance creating a part-paid fire department, and thereafter attempted to appoint a chief of the fire department. Eight candidates, including the prosecutor, presented themselves for a physical and mental examination. According to the rating adopted by the examining board, Ziegler stood highest, and received the appointment, which was subsequently confirmed by the commissioners, after which these proceedings were instituted attacking the legality of the appointment.

It is contended that the act of 1914 under which the defendant acted is unconstitutional as violative of article 4, section 7, paragraph 2 of the constitution, which provides that the legislature shall not pass private, local or special

laws "regulating the internal affairs of towns and counties, and appointing local officers or commissions to regulate municipal affairs."

The Court of Errors and Appeals in *Hermann v. Guttenberg*, 63 N. J. L. 616, recognized commissions such as this defendant as "a class by themselves."

The act of 1868 constituting the commission, provides that it shall be entitled "The Hackensack Improvement Commission." This differentiation and recognition of defendant as a distinct class for legislation and judicial decision, makes it manifest the defendant stands with such other municipalities as are indicated by its peculiar nomenclature as "a class by themselves," for which under the construction accorded to the constitutional provision under review, by this court and the Court of Errors and Appeals, in numerous adjudications, legislation of the character in question is entirely appropriate. *Hermann v. Guttenberg*, *ubi supra*.

No objection could exist to this act if it be conceded that the defendant forms a class by itself, and that the legislation under review cannot possibly operate upon more than a single object. *Budd v. Hancock*, 66 N. J. L. 133.

The difficulty, however, of supporting the act as constitutional legislation inheres in the fact, that by its limitation, a department of public service common to all municipalities, and in nowise peculiar to any municipality is delimited in use to the class of which this defendant forms the most conspicuous type and example. Under such a situation, legislation of this character has uniformly been condemned by the adjudications of this court and those of the Court of Errors and Appeals.

Dobbins v. Long Branch, 59 N. J. L. 146, presents a situation *mutatis mutandis* practically similar. There the act *sub judice* was "An act authorizing municipalities governed by commissioners to pave and improve streets and avenues, and provide payment therefor." *Gen. Stat.*, p. 2156.

This court condemning the act as violative of the constitutional provision here invoked said: "The act is one which

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attempts to grant certain corporate powers and to regulate the internal affairs of the municipalities, and there is no substantial or natural reason that can be proved why its powers and privileges should be conferred alone upon municipalities governed by commissioners in exclusion of all other municipalities of like character governed otherwise." Similar adjudications are: *Helper v. Simon*, 53 N. J. L. 550; *Canfield v. Davies*, 61 Id. 26; *Ross v. Winsor*, 48 Id. 95; *Wanser v. Hoos*, 60 Id. 482; *Delaware River Transportation Co. v. Trenton*, 86 Id. 48; *affirmed*, Id. 679.

While we find it necessary to condemn the act under review as special and local, the ordinance in question is not thereby rendered inoperative and ineffectual since under the provisions of the act entitled "An act to enlarge the powers of the boards of commissions of certain of the towns of this state," approved March 9th, 1882 (*Pamph. L.*, p. 80; *Comp. Stat.*, p. 5501), we find ample provision made to warrant the passage of the ordinance under review. That act confers upon the defendant the necessary power to "purchase engines, hose and other apparatus" and "to contract and organize fire departments for their respective towns and may make all needful rules and regulations touching the matters aforesaid."

The defendant, as the legal successor of the township committee of the township of New Barbadoes, in the county of Bergen, pursuant to the provisions of the act of 1896 (*Comp. Stat.*, p. 5620, pl. 102), may properly avail itself of the provisions of that act for the purpose in question.

The liberality of interpretation accorded to the word "town" in this connection, in *Hermann v. Guttenberg*, *ubi supra*, by the Court of Errors and Appeals, serves to warrant the inclusion of the defendant as one of the class of municipalities comprehended within the legislative designation of towns governed by boards of commissions.

The final contention of the prosecutor is that the appointment was not made in accordance with the provisions of the ordinance.

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This result is essentially equivalent to declaring that Ziegler is the possessor of an office which he is not entitled by law to hold, and upon well-settled principles, such a question is not one for disposition by *certiorari*, but can be legally dealt with only by *quo warranto*. As a result, the writ must be dismissed, with costs.

ROBERT CARSON, PROSECUTOR, v. SAMUEL KALISCH,
JUSTICE OF THE SUPREME COURT, AND THOMAS J.
SCULLY, DEFENDANTS.

Argued November 24, 1916—Decided November 26, 1916.

1. Section 159 of the act concerning elections (*Comp. Stat.*, p. 2125), providing a procedure to obtain a recount of the votes cast at an election, applies to a contest in an election for member of congress from this state.
2. *Held*, also, that the petition for a recount set out sufficient facts to warrant an order for a recount, under *Kearns v. Edwards*, 28 *Atl. Rep.* 723, and that the petition was properly verified, under *Johnson v. Allen*, 55 *N. J. L.* 400, 401.

Before Justice KALISCH, on stipulation between counsel.

For the prosecutor, *Theodore Strong*.

For the defendants, *Thomas P. Fay* and *Lindley M. Garrison*.

The opinion of the court was delivered by

KALISCH, J. The prosecutor seeks to set aside an order made by a justice of the Supreme Court for a recount of the votes cast at the last general election for candidates for congress in the third congressional district, comprising Middlesex, Monmouth and Ocean counties, in which district the prosecutor, Robert Carson, and Thomas J. Scully, the defendant, were congressional candidates, upon the ground, chiefly, that section 159 of the act concerning elections

(*Comp. Stat.*, p. 2125), under which the order was made, does not confer any power or authority on a Supreme Court justice to make such an order in relation to congressional candidates.

Section 159, *supra*, provides: "Whenever any candidate at any election shall have reason to believe that an error has been made by any board of elections or of canvassers in counting the vote or declaring the vote of such election * * * whereby the result of such election has been changed, such candidate * * * may, within ten days after such election, apply to any justice of the Supreme Court, who shall be authorized to order and cause, upon such terms as he may deem proper, a recount of the whole or such part of the votes as he may determine, to be publicly made under his direction by the county board of elections, after due notice by such candidates to the parties interested of the time and place of such recount; and, if it shall appear upon such recount that an error has been made sufficient to change the result of such election, then such justice in case of candidates shall revoke the certificates of election already issued to any person, and shall issue in its place another certificate in favor of the party who shall be found to have received a majority of the votes cast at such election; and in case of referendums or questions shall make a certificate that the result of such election be corrected; which certificates shall supersede all others and entitle the holder thereof to the same rights and privileges as if said certificates had been originally issued by the canvassing board."

Only so much of section 159 has been quoted as is pertinent to the matter in hand.

The insistence of counsel for the prosecutor is that the legislative intent was to confine the provisions of this section to candidates for election, such as state senators, members of assembly, surrogates and other county and municipal officers who, if elected, are, under the statute, entitled to receive their certificates of election from the county board of canvassers. And, in furtherance of this view, it is strenuously argued that the clear legislative design to exclude candidates at an elec-

tion for governor, United States senator, members of congress and presidential electors, whose election under the statute is to be determined by the state board of canvassers, is made manifest by the provisions of sections 160 and 161 relating to the recount of votes, and section 164 relative to contested elections for county officers, &c.

In support of this it is contended that section 160 requires that whenever a certificate is issued by a justice of the Supreme Court, as provided in certain cases by section 159, such certificates "shall be filed with the clerk of the county or municipality in and for which such election was held;" and that such clerk shall make and certify a copy thereof and shall without delay deliver such copy to the person who shall be declared elected; and that in case of an election for senator, members of assembly, or any county officers, the county clerk shall within five days thereafter transmit to the secretary of state, at Trenton, another copy of such certificate, signed by him and attested by his official seal; and hence it is clear that the statutory machinery provided to put into effect a certificate granted after a recount had, by virtue of the provisions of section 159, is wholly inapplicable to candidates for congress, for the reasons, firstly, that the issuance of such certificate is limited to elections held in and for a county or municipality, whereas in the present case the election of a congressman was in and for a district comprising three counties; and as the declared object of such new certificate is to revoke one previously issued by the board of canvassers of the county in and for which the election was held, and since no certificate is authorized to be or was issued by the board of county canvassers to either candidate for congress and none filed with the county clerk, and further, because in such a case the vote is canvassed by the state board of canvassers and the certificate issued by the secretary of state, that, therefore, there could be no certificate on file to revoke in the office of the clerk of the county in and for which county the election was had. Secondly, that section 161 of the Election act requires the applicant for a recount either to deposit a sum of money with the clerk or give se-

curity for the payment of the expenses of such recount to the "incumbent," &c., and that by section 164 of the same act, the term "incumbent" is declared to mean the persons whom the canvassers declare elected, and that section 161, *supra*, further provides that "if it shall appear an error sufficient to change the result has been made, then the expense of such recount shall be paid by the county or municipality in and for which such election was held," and that, therefore, it is obvious that the applicant for a recount must be an "incumbent" that is declared to have been elected by the board of canvassers before he can apply for a recount, and, as the state board of canvassers are not authorized to meet for the purpose to canvass the votes cast at a general election, and to declare the result until twenty-one days after the day of election, and whereas no certificate can be issued to the successful candidate until twenty-one days after such election, it follows as a necessary conclusion that a candidate for congress is not within the purview of section 159, because that section requires that the application for a recount by a candidate shall be made within ten days after election; and that such a candidate is, also, not within the purview of the other sections above referred to, because they expressly deal with candidates elected in and for a county or municipality; whereas a congressman is elected in and for a congressional district. Concretely stated, the position taken by counsel for the prosecutor is to the effect that the issuance of a certificate of election to the successful candidate is a condition precedent to the right of a defeated candidate to apply for a recount of votes, and that in any event a candidate for congress is not within the purview of the act, and, therefore, the order for the recount made in the present case was unauthorized.

The fabric of the argument in support of this contention consists of assumptions and inferences which attempt to refute the express declarations of section 159. This section does not require, as has been assumed, that there shall be a declaration of the vote by a board of canvassers or a certificate issued to the successful candidate before an application may be made for a recount by an unsuccessful candidate for

the office, but, on the contrary, the section, in unmistakable terms, provides that an error made sufficient to change the result of the election by any board of elections or board of canvassers in counting or declaring the vote shall afford the basis of a recount. The board of elections alluded to is the board of elections of an election district and is a distinct body from the county board of elections which is also the board of canvassers for the county.

The statutory basis for a recount is either an error in the count of or in declaring the vote by a board of elections, or an error in the count of or in declaring the vote by a board of canvassers. It is, therefore, too plain to admit of any controversy that an unsuccessful candidate may before the vote is sent to the board of canvassers apply for a recount according to the express terms of the statute.

Furthermore, since the statute provides that the application for a recount may be made within ten days after the election, which limitation of time has been held to be mandatory in the Van Noort case, by Mr. Justice Minturn (85 *Atl. Rep.* 813), it is fair to presume that it was the legislative intent that the application should be made as speedily as possible, so that the error, if any, could be promptly corrected, irrespective of the fact whether the vote had been declared or not by the board of canvassers. But if the view of counsel for the prosecutor were adopted, the prime object of the act, which is to secure a recount, would be subject to be defeated, for under the Election law the board of canvassers cannot legally convene to canvass votes until six days after the election, and in large counties, like Essex and Hudson, where the boards are often required to adjourn to some future day to finish the canvass of votes, such adjournment might extend beyond the ten days' limit from the date of the election and thus render the provision for a recount inefficacious.

The provision of section 159, to the effect that where it shall appear upon such recount that an error has been made sufficient to change the result of such election, the justice of the Supreme Court shall revoke the certificate of election already issued to any person and shall issue in its place

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another certificate, &c., is consistent with the views above expressed, because the legislature evidently had in mind that there might be candidates who would apply for a recount of the votes after the canvassing board had declared the vote and issued the certificate to the successful candidate, and it was manifestly to meet such contingencies that this provision was inserted in the act.

The requirement of section 160, "that whenever any such certificate shall be issued, &c., the same shall be filed with the clerk of the county in and for which such election was had," clearly refers to certificates to be issued by the justice, under section 159, to revoke certificates which have been issued to county and municipal officers and does not in legal effect exclude the existence of a right to the issuance of a certificate in favor of a candidate at an election in whose favor no certificate was issued but who is found on the recount to have received a majority of the votes cast. And, as there is a well-recognized canon of statutory construction that words relating to persons of inferior rank will not be so construed as to include persons of a superior rank, section 160 cannot, therefore, have the legal effect of excepting out of the operation of section 159 candidates for congress.

The legislative design in enacting section 160 was not to narrow the scope of the application of section 159 to any candidate at any election, but to point out a special procedure peculiarly applicable to candidates for county and municipal offices.

And this view is equally applicable to section 161. For if the term "incumbent" in this section is to receive the legislative meaning ascribed to the term in section 164 of the act relating to contested elections, namely, that of a candidate who has been declared elected by a board of canvassers, it can have no other legal effect than to regulate the procedure of a recount in a case where a certificate of election had already been issued to one of the candidates. That is not the case here.

But even if it appeared that by reason of the statutory machinery provided by the legislature to carry into effective

operation the provisions of section 159 that such machinery is inapt to an election of a candidate for congress, that would not afford a sufficient legal justification to ignore the prime object of the act, namely, that "whenever any candidate at any election shall have reason to believe that an error has been made by any board of elections or of canvassers in counting the vote or declaring the vote of such election," &c., such candidate is entitled to a recount.

It is difficult to conceive of a collocation of words more expressive of a legislative design to inaugurate a public policy in the interest of the people of this state than the language just quoted. The obvious design was to give effect to the will of the people as expressed by their votes.

This broad design would be seriously impaired if it were permitted upon unsubstantial or technical grounds to add to the statutory words "any candidate at any election" the words "for state senator, member of assembly or county or municipal office." The act, as it originally stood (*Pamph. L.* 1880, p. 229), did so limit its provisions to "any election in this state for member of the senate or member of the assembly," and by *Pamph. L.* 1895, p. 659, this was changed to "any candidate for any office," and, finally, by *Pamph. L.* 1898, p. 310, changed to "any candidate at any election." Some significance must be given to these changes.

No sound reason has been advanced, and it may be fairly said that none can be given, why there should be any differentiation of the will of the people, as expressed by their votes, in a congressional district or in the entire state, from that expressed in the city or county. To give it the construction contended for by the prosecutor would run the statute into the height of absurdity. In *Gage v. Clark*, 51 N. J. L. 97, a contested election case, Mr. Justice Dixon, in delivering the opinion of the Supreme Court (on p. 99), said: "A further argument is presented by counsel for the prosecutor, based upon the provisions of section 111 of the statute, to the effect that a successful contestant shall be 'entitled to his certificate,' and 'the certificate of election' of the defeated incumbent shall be annulled. Counsel contends that these pro-

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visions are inapplicable to justices of the peace because they do not receive certificates of election, and, therefore, these officers are not embraced in any part of the law.

"But we think this conclusion is too broad for the premise. The formal annulment of an old certificate and granting of a new one are quite unimportant for any useful object at which the law aimed. It would be an unreasonable interpretation of the statute to confine its substantial enactments within the limits of these purely formal provisions. It is much more rational to assume that the legislature intended to give full effect to what was important, and overlooked the fact what was in all cases immaterial was also sometimes inapt." And *In re Stewart*, a contested election case reported in 50 N. E. Rep. 51, Judge Bartlett, in speaking for the Court of Appeals (on p. 53), said: "The object of elections is to ascertain the popular will, and not to thwart it. The object of election laws is to secure the rights of duly-qualified electors, and not defeat them. Statutory regulations are enacted to secure freedom of choice, and to prevent fraud, and not by technical obstructions to make the right of voting insecure."

It is consonant with the best judicial thought on the subject that in the construction of election laws to construe them liberally. A careful analysis of the provisions of section 159 will reveal that the section affords a complete scheme for a recount in the case of a congressional candidate.

This section applies to any candidate at any election. It authorizes, in general terms, a justice of the Supreme Court to order, or cause upon such terms as he may deem proper, a recount of the whole or any part of such votes cast at the election. As one of the terms the justice could properly order the giving of a bond by a congressional candidate to secure the payment of the cost of such recount. This section further empowers the justice, if the recount changes the result of the election, to issue a certificate to the successful candidate, &c. Whether the provisions of this section can be effectively enforced after the recount is had and decided is

not before me in this proceeding. The only question to be passed on in the present case is whether or not section 159 includes within its terms the granting of a recount in a proper case to a congressional candidate. The views herein expressed lead to the conclusion that it does. The order for a recount was therefore within the jurisdiction of a Supreme Court justice to make.

The next reason assigned for setting aside the order is that "due notice of the time and place of the recount has not been given to the prosecutor." The statute provides that a justice of the Supreme Court shall be authorized to order and cause a recount to be made under his direction, "after due notice of such candidate to the parties interested of the time and place of such recount."

The order was made on the 15th day of November, 1916, and provided that the recount should be begun on Monday, the 20th day of November, 1916. It directed that notice of the time and place of such recount be served upon the prosecutor, Robert Carson, within three days from the date thereof. It appears that it was actually served upon the prosecutor within two days from the date thereof. This constituted due notice.

Another reason assigned is that due notice of the contents of the petition has not been given to the prosecutor.

The statute on which this proceeding is founded makes no such direction.

The reason assigned that the order was not filed within due time is also without merit. The statute does not require the filing of any order. The return to the writ in this case shows that a petition for a recount and the order made by the justice of the Supreme Court were marked filed on November 15th, 1916, the day of the application for the recount. It is conceded by counsel for the prosecutor that he procured a copy of the petition on the 18th day of November, 1916, from one of the counsel of Mr. Scully. It does not appear that any injury resulted to the prosecutor by reason of the failure to have a copy of the petition earlier.

The next point urged is, that the petition is insufficient to warrant an order for a recount. An examination of the petition shows that it sets out all the facts required by section 159 to constitute the basis of an order for a recount. The cases cited by counsel for the prosecutor in support of his contention deal with contested election cases and are not applicable to petitions for a recount. In *Kearns v. Edwards*, 28 *Atl. Rep.* 723, there was an order for a recount, made *ex parte* by Mr. Justice Depue, with leave to the candidate interested to apply to set it aside. Upon the argument it was objected that the petition stated no facts upon which the petition was filed that an error has been made in counting the votes. The petition was held to be sufficient.

Lastly, it is objected that the petition is not properly verified.

The precise objection relied on is that the petitioner's affidavit as to the facts set out in his petition relating to acts not his own is made on belief only. This objection appears to be fully answered by what was said by Mr. Justice Dixon in *Johnson v. Allen*, 55 *N. J. L.* 400, a contested election case. The learned justice (on *p.* 401) said: "If the statute had prescribed verification by the oath of the contestant himself, as in *Kirk v. Rhoads*, 46 *Cal.* 398, it might fairly be urged that it was enough for him to swear to the best of his knowledge, information and belief, because, except in rare instances, he would be able to swear to nothing more, and it could not be supposed that the legislature had in view only such rare instances."

It is to be observed in this connection that section 159 makes no provision as to the manner in which an application for a recount shall be presented, nor does it require a verification of the facts upon which the application for a recount is made.

The writ will be dismissed, without costs.

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MICHAEL J. DURKIN ET AL., PROSECUTORS, v. BOARD OF
FIRE COMMISSIONERS OF THE CITY OF NEWARK,
DEFENDANT.

Submitted July 6, 1916—Decided December 7, 1916.

1. The act of March 24th, 1885 (*Pamph. L.*, p. 130), prescribing that certain officers and men employed by municipal authority in the fire department of any city shall hold their respective offices during good behavior, efficiency and residence in such city, does not prohibit the reduction in rank of such officials for reasons of economy in the service.
2. In section 1 of *Pamph. L.* 1906, p. 429 (*Comp. Stat.*, p. 2402, pl. 298), which provides, among other things, that battalion chiefs shall hold their office or employment during good behavior and shall be removed for cause after a hearing or opportunity therefor is afforded, the word "cause" in the statute does not necessarily mean one of the causes designated in *Pamph. L.* 1885, p. 130. Consequently, in a city having a fire department organized under the authority of *Pamph. L.* 1885, p. 326, an official in the fire department may be reduced in rank in the interests of the economical administration of the department, when done in good faith to promote the efficiency of the service, although it may displace some men whose positions are secured to them during good behavior.
3. Section 24 of the Civil Service law (*Comp. Stat.*, p. 3804) does not tend to protect officers in the police department of a municipality against reduction in rank where such reduction was not the result of discrimination because of their religious or political opinions or affiliation, but was made in the interest of economy in the affairs of government.

On certiorari.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutors, *Frank E. Bradner*.

For the defendant, *Harry Kalisch*.

The opinion of the court was delivered by

KALISCH, J. The five prosecutors, Michael J. Durkin, Thomas S. Reilly, Charles S. Storch, Cornelius Smith and

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James Fagan, Jr., are members of the fire department of the city of Newark.

Each of the prosecutors was reduced, by the board of fire commissioners of the city of Newark, from the rank and salary of a battalion chief to the rank and salary of a captain.

The prosecutors, severally, sued out writs of *certiorari* to review the legality of the action of the board, and, as the same legal question is presented by these writs, the cases were consolidated and argued together.

The facts are briefly these: In June, 1914, the prosecutors, who were captains in the fire department, were made battalion chiefs. The city of Newark then contained five battalion districts under the supervision of four battalion chiefs, there being a vacancy in one of the districts. Each battalion chief was equipped, at the expense of the municipality, with a horse and gig at an initial cost of about \$550. The upkeep of these equipments was the source of considerable expense. The promotion of the prosecutors carried with it an increase of \$400 in the salary of each, annually. No new battalion districts were created and no equipments had been furnished to the promoted men. The effect of the advance of the prosecutors to battalion chiefs was to increase the force of the latter from five to nine for the five battalion districts. To carve out of the old division new battalion districts, and to provide the proper equipment for the new battalion chiefs, and to maintain the battalion stations properly, would require the expenditure of large sums of money.

It further appeared that the affairs of the fire department had been conducted with efficiency at the time, when, in 1914, the five battalion districts were under the supervision of the four battalion chiefs.

Confronted with this situation, the board of fire commissioners of 1915, on the 11th day of February, 1915, notified each of the prosecutors to appear before the board on February 24th, 1915, and show cause why he should not be reduced to the rank of captain for reasons of economy. The prosecutors, with counsel, appeared before the board at the time stated and asked leave to file written answers, which

privilege was accorded them. At the request of their counsel a further continuance was granted them, and they filed their several answers on March 3d, 1915, in which they set up that their reduction to the rank of captain for reasons of economy was not in the nature of a charge against them in compliance with the Civil Service law, and that the board was without power to make the reduction in rank on grounds of economy, and furthermore that no such grounds existed. The prosecutors offered no testimony before the board and were content to rest upon their answers, whereupon the board passed the following resolution: "*Resolved*, That for reasons of economy Battalion Chiefs Thomas S. Reilly, Charles C. Storch, James Fagan, Jr., Michael J. Durkin and Cornelius Smith, be and are hereby reduced to the rank and salary of captain, beginning March 16th, 1915. Adopted March 3d, 1915."

Nine reasons have been assigned by counsel for the prosecutors why the resolution demoting the prosecutors should be set aside, but only two are relied on and presented in the brief for our consideration. The two reasons relied on and argued in the brief embody the following propositions: Firstly, that no member of the fire department can be reduced in rank except for cause as specified by the statutes, and only after a trial upon specific charges; secondly, that the prosecutors could only be reduced in rank in accordance with the Civil Service law.

In order to sustain the view expressed in the first proposition, counsel for the prosecutors pointed out that the act approved March 24th, 1885 (*Pamph. L.*, p. 130; *Comp. Stat.*, p. 2391, § 256), prescribes that the officers and men employed by municipal authority in the fire department of any city shall severally hold their respective offices and continue in their respective employment as such municipal officers and employes during good behavior, efficiency and residence in such city, except where, by statute, the term of any such officer and employe is determined and fixed and does not depend upon the pleasure or caprice of any municipal officer, officers or board authorized to make appointment or employment in said department, and that such officer or employe shall not

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be removed from such office or employment for political reasons or for any other cause than incapacity, misconduct, non-residence or disobedience of just rules and regulations. And from this counsel argues that according to the construction put on this statute, in *Michaelis v. Jersey City*, 49 N. J. L. 154, where it was held that the transfer of an employe in the Jersey City fire department from his position of engineer to that of stoker, the latter position being attended with different duties and different pay, was invalid, and it appearing that the reduction of the prosecutors in the present case is to a rank requiring different duties and less pay, therefore, the present case is controlled by the one cited, and the reduction in rank of the prosecutors must be declared invalid.

And it is further insisted that because section 1 of the act of 1906 (*Pamph. L.*, p. 429; *Comp. Stat.*, p. 2402, pl. 298) provides, among other things, that battalion chiefs shall hold their office or employment during good behavior and shall be removed for cause after a hearing or opportunity therefor is afforded, the word "cause" in the statute must be held to mean one of the causes designated in the act of 1885.

The force of this argument is much weakened by the fact that in an act entitled "An act to remove the fire and police departments in the cities of this state from political control," approved May 2d, 1885 (*Pamph. L.*, p. 326; *Comp. Stat.*, p. 2341), under which a board of fire commissioners was organized in the city of Newark, it is provided by section 1, *placitum* 64, page 2341 of the compiled statutes that the board of fire commissioners shall be entrusted with the government, control and management of the fire department, and with the direction and control of all public fire matters, subject to the inspection and supervision of the common council of such city, as in the act provided.

And that by *placitum* 70, section 7, it is further provided, *inter alia*, that the board shall be authorized and empowered to employ such persons as may be deemed necessary by said board from time to time, and shall be authorized and empowered to declare vacant any and all of the offices or posi-

tions therein or thereunder as to such board may appear best for the public interest in the department.

And that by *placitum* 71, section 8, it is further provided, *inter alia*, that the board shall have full power and right to suspend and to expel or discharge any person employed or appointed in or under the control of the board, provided good cause shall be shown for such suspension, expulsion or discharge after an investigation by such board.

The legal effect of these provisions, and their effect on the provisions of the earlier act of 1885, *supra*, was dealt with by the Court of Errors and Appeals in *Newark v. Lyon*, 53 N. J. L. 632, which case involved the legality of a resolution of the board of fire commissioners abolishing the call system in the fire department, which resulted that all members of the fire department, who were "call members," ceased to be such and lost their employment.

Judge Scudder, who delivered the opinion of that court, in discussing the nature of the tenure of office held under the acts referred to (on p. 635), said: "They cannot in such a case be tried and discharged for any of the causes named in the statute, for there is no incapacity, misconduct, non-residence or disobedience of orders that can be shown against them. The cause is not in them, but in the public advantage of the change. They must, therefore, remain in office or be dealt with in some way satisfactory to themselves. But why should cities be obliged to retain a larger number of men in service when a select body of a smaller number will be sufficient and do better service, when constantly on duty? This embarrassment was certainly not contemplated when these acts for the protection of deserving men against the designs of successful politicians, hurtful to the public as well as to the incumbents, were passed, and such construction should not be given to them." And (on p. 637), the learned justice, in speaking of the powers of the board, said: "It certainly can in its government, control and management of an existing department vacate or abolish superfluous, expensive and antiquated offices, if done in good faith to promote the efficiency of the service, although it may displace some men

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whose positions are secured to them during good behavior. The tenure of office is qualified by the continuance of the office."

Counsel for the prosecutor does not contend that under *Newark v. Lyon, supra*, the board of fire commissioners had no power to abolish or vacate the position of a battalion chief. His contention is that because the board did not attempt to vacate any office or to abolish the rank of battalion chief the demotion of the prosecutors did not fall within the reasoning of that case. We think the present case is clearly within the reasoning of *Newark v. Lyon*.

We are unable to perceive any difference in principle, in so far as the economical administration of governmental affairs is concerned, between the act abolishing an office or position that is needless and the act of reducing men in rank or discharging them altogether from office or position whose services in that office or position are unnecessary and needless. Both acts aim at economy in the public service. It is just as vicious and injurious to the public welfare to keep men in office or position whose services are not needed as to maintain needless offices or positions. Both involve a useless and unwarranted expenditure of the money of the taxpayer.

The contention of counsel carried out to a logical conclusion would require this court to declare that in order to get rid of unnecessary employes in office or position that the office or position be first abolished, and this irrespective of the fact whether or not such office or position constituted an essential part of the government. The legislature never intended anything so unreasonable as that. The fact that the services of the prosecutors were not needed as battalion chiefs constituted a good cause for their reduction to a rank where their services could be utilized to maintain the efficiency of the fire department. This is what the board of fire commissioners evidently thought when they effected the change.

Section 24 of the Civil Service law (*Comp. Stat.*, p. 3804), which has also been invoked in behalf of the prosecutors, does not tend to protect them against reduction in rank where such reduction was not the result of discrimination

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because of their religious or political opinions or affiliations, but was made in the interest of economy in the affairs of government. *Paddock v. Hudson Tax Board*, 82 N. J. L. 360; *Colgarry v. Street Commissioners of Newark*, 85 Id. 583.

The testimony taken in the present case tends to establish that the services of the prosecutors were not needed as battalion chiefs, and that their reduction in rank and pay by the board of fire commissioners was warranted upon the ground of economy.

The writs will be dismissed, with costs.

THIRZA ANN FOLEY, PROSECUTRIX, v. HOME RUBBER
COMPANY, RESPONDENT.

Submitted March 16, 1916—Decided January 11, 1917.

1. Where compensation is sought under section 2 of the Workmen's Compensation act (*Pamph. L. 1911, p. 136*), the question of negligence does not enter into consideration, and it is not necessary that it be shown that the accident is one of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause.
2. An employe, in going to a European country on his employer's business, set sail, to the knowledge of his employer, on a vessel sailing under the flag of a country then at war. While on the voyage the vessel was sunk by an enemy submarine and the employe lost his life. *Held*, that the death of the employe arose from an extraordinary risk which might reasonably have been anticipated by the employer, and that death resulted from an accident arising out of and in the course of decedent's employment. The fact that the vessel was sunk by the designed act of a belligerent does not put the case on any different footing than if the employe had lost his life in any of the other various ways recognized as the dangers incident to travel.

On certiorari.

Before Justices PARKER, MINTURN and KALISCH.

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For the prosecutrix, *Fredk. W. Gnichtel*.

For the respondent, *Jess & Rogers*.

The opinion of the court was delivered by

KALISCH, J. The prosecutrix's husband, Arthur F. Foley, deceased, was in his lifetime in the employ of the respondent as a special traveling salesman and manager of its European trade. In the course of his employment it was necessary to visit the respondent's London office which was its European headquarters. The deceased engaged passage on the *Lusitania*, which steamship was listed to steam from the port of New York to Liverpool on May 1st, 1915, under the British flag. The steamer carried passengers and ordinary freight and some cartridges for war use. There was an American steamer scheduled to steam for a British port under the protection of the American flag on the same day that the *Lusitania* was due to leave, on which American steamer the deceased might have procured passage, so far as his duties or requirements of his employment were concerned. The respondent did not instruct the deceased on what particular steamer to make the journey, but knew of the fact that the deceased had engaged passage on the *Lusitania* and offered no objection. On the 7th day of May, 1915, while the *Lusitania* was within the zone or area which had theretofore been declared the war zone by the German government, she was attacked and torpedoed by a German submarine which caused the steamship to sink within a few minutes, and the death of the deceased was the result of the sinking of the steamship.

In the Court of Common Pleas of Mercer county, counsel for the respective parties stipulated in writing as to the facts as above related and it was on this stipulation that the trial judge made his findings and rule for judgment for the respondent.

The trial judge found that the deceased came to his death as a result of an accident in the course of his employment.

The finding made by the trial judge, which gives rise to the vital question under discussion and which is the turning

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point of the case is as follows: "I find that the said accident did not arise out of the employment of the said deceased, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, and that the petition filed in the cause must be dismissed, but without costs to the petitioner."

Whether or not an accident arose out of an employment is invariably a mixed question of law and fact. It is well settled by the decisions of our courts that if there is any testimony to support the determination of fact it will not be reviewed.

Here, however, it is apparent that the determination of fact was founded upon a misconception by the trial judge of the legal principle applicable thereto, and therefore the legal propriety of such finding is reviewable.

The trial judge appears to have disposed of the facts involved in this case upon the mistaken notion that in order to hold a master responsible for an injury to his employe as the result of an accident, the accident must be one of which the actual or lawfully imputed negligence is the natural and proximate cause, whereas it is clear from a plain reading of the statute that the question of negligence does not enter into the consideration of the case at all, where compensation is sought, as in this case, under section 2 of the Workmen's Compensation act. *Pamph. L. 1911, p. 136.*

The legal principle which was applied by the trial judge to the facts of the present case is solely applicable to actions at law commenced under section 1 of the act above recited.

The question presented for our decision is whether the destruction of the *Lusitania* by a submarine and the death of the deceased in consequence was an accident arising out of the employment. The facts in this case are undisputed, and therefore the same situation in that respect is present as existed in *Walther, Executrix, v. American Paper Co.*, decided at the November term, 1916, of the Court of Errors and Appeals (*post p. 732*), where the court reviewed the finding of the Court of Common Pleas, affirmed by the Supreme Court in 98 *Atl. Rep.* 264, that the accident, established by the evidence, arose out of the employment, and reversed the judgment.

For the respondent it is contended that the accident did not arise out of the employment, in that the destruction of the *Lusitania* by being torpedoed was something that was not reasonably to have been anticipated. In *Hulley v. Moosbrugger*, 88 N. J. L. 161, the Court of Errors and Appeals decided that where an accident is the result of risk reasonably incident to the employment, it is an accident arising out of the employment. In that case it was held that skylarking among employes, whereby a co-employee who neither instigated nor took part in it was injured, was not a risk reasonably to be anticipated by the employer and therefore the injury was not the result of an accident arising out of the employment.

Following the rule laid down in that case it was held by this court, in *Schmoll v. Weisbrod & Hess Brewing Co.* (*ante* p. 150), where the agent and collector of the brewing company, while on his employer's business in a district of bad repute, was shot by some person unknown, that in the absence of any proof that the motive of the assailant was robbery or that the employer had notice or knowledge of the dangerous character of the locality, it could not properly be said that the shooting of the agent was an accident arising out of the employment. In *Walther v. American Paper Co.*, *supra*, the decedent was a night watchman in a mill and while engaged in such employment was struck down with a club and killed by his assailant who took from the vest pocket of the deceased \$15. The assailant knew that the deceased had been paid his wages that day and went to the mill in the night time on purpose to rob the deceased. He made no attempt at any robbery from the office of the mill or any destruction of the mill property or any mischief or crime other than the robbery of Walther.

The Court of Errors and Appeals held that the death of the deceased was not the result of an accident arising out of his employment and that the case could not be distinguished from *Hulley v. Moosbrugger*, *supra*. From this it is plainly inferable that it was the view of the court that since the design of Walther's assailant was directed against Walther

personally and not against the property of the master, and therefore might have been carried out at any other time or place, it was an act so unrelated to the employment that it could not be reasonably said to be an accident arising out of the employment. We think the present case is clearly distinguishable from the cases cited. The agreed facts disclose that the Home Rubber Company knew that its agent was booked for a passage on the Lusitania; it knew that the Lusitania was a ship steaming under the flag of Great Britain, a nation at war with Germany; it knew (according to the stipulation) that a war zone had been declared by the German government in which all enemy ships would be liable to destruction by German naval forces, thus endangering the lives of passengers. The stipulation from which the inference of such knowledge of the respondent is drawn reads as follows: "That while the said steamship Lusitania was on its way across the Atlantic ocean and while passing the coast of Ireland, and in the zone of waters *theretofore publicly declared* by the German government to be a war zone, in which all enemy ships would be liable to destruction by German naval forces," &c.

But if it can be fairly said that the respondent had no notice of this declaration of the German government and was not therefore legally bound to take notice of it, nevertheless it was bound to take notice that a condition of war existed between Great Britain and Germany and that ships of the enemy were subject to be captured or destroyed by such warring nations. This was a danger reasonably to be apprehended. This danger attached itself to every traveler on an enemy ship, whether engaged in the pursuit of pleasure or in the course of his or her employment.

The extraordinary risk in the present case arose from the fact that Foley was on an enemy ship in the course of his employment. His employer knew of this risk. If the Lusitania had been lost through a collision, fire or storm at sea, resulting in the death of Foley, it would, under the principle enunciated in all the cases bearing on this subject, be held to have been an accident arising out of his employment.

Foley's presence on the ship was connected with the very employment in which he was engaged. The fact that the *Lusitania* was lost through none of the common perils of the sea, but by an extraordinary peril, does not make the extraordinary peril less a cause of accident arising out of Foley's employment. Both Foley and his employer were chargeable with knowledge of the perils of war upon the high seas. They must be assumed to have known that a belligerent vessel sailing under a belligerent flag, carrying contraband of war, subjected the vessel to attack by an enemy vessel, and that as a result of such attack, under many contingencies recognized by the law of nations, not only the loss of the vessel attacked, but the loss of lives of those upon her might result. The fact that the attack in this instance was not executed in a way that might have been anticipated, but in a manner said to be contrary to the law of nations, may operate to qualify the degree or nature of the danger and risk to such a peril, but does not eliminate the essential factor in the case that the voyage was one pregnant with risk which the employer must have contemplated as arising out of and in the course of the employment. Such appears to have been the reasoning in *Zabriskie v. Erie Railroad Co.*, 86 N. J. L. 266, holding that where the employe left the shop and crossed a danger zone of two railroad tracks of the main line of the Erie railroad, laid at grade, upon a much traveled public highway, in order to reach a toilet and was killed, that the danger and risk of the journey must have been within the contemplation of the employer. It becomes at once apparent that the fact whether or not the automobile which killed the employe was operated in a lawful manner or was lawfully upon the highway, was not regarded as an essential factor in the case.

In the present case if the *Lusitania* had struck a mine instead of being torpedoed, resulting in Foley's death, could it be reasonably contended that his death was not due to an accident arising out of his employment? We think not. It may be well said that those whose employments require them to travel by land or sea are known by their employers to be subject to the common perils that such traveling incurs. The

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risk is inherent in the employment itself. The manner in which the accident is brought about is not at all of the essence of the matter, the vital question always being, was the accident connected with the employment? If it was, then it arose out of the employment, provided it occurred in the course of the employment.

Let us test the soundness of the proposition just stated. Suppose the *Lusitania* had not been torpedoed but captured, and in transferring the passengers to lifeboats, Foley lost his life; or after the passengers had been transferred to lifeboats a storm had arisen, sinking the lifeboat in which Foley was; could there be any doubt whatever that Foley would have been considered to have lost his life by an accident arising out of his employment. This is the underlying doctrine of *Zabriskie v. Erie Railroad Co.*, *supra*, and *Terlecki v. Straus*, 85 N. J. L. 454; 86 *Id.* 708.

It is a matter of common knowledge that thousands of traveling salesmen travel daily in the course of their employment in cars propelled by steam, electricity and other propelling power, and therefore are subject to the risk of being injured or killed by reason of a collision or derailment; or by the cars going through an open draw or falling from a defective trestle, &c. The fact that the collision or derailment was caused by some malicious person with the design to injure a railroad company or some person in its employ, would not operate to make an injury received by a salesman traveling on the car collided with or derailed, any the less an injury, the result of an accident arising out of the employment of such salesmen, than if such injury had been received by him as a result of the cars going through an open draw or falling from a defective trestle.

It must be borne in mind that the denial of a right of compensation in the Walther case was put upon the ground that the design of the assailant was to rob Walther and not Walther's master, and hence the attack made on Walther was not connected with Walther's employment, and that the denial of compensation in the Schmoll case was rested upon the

fact that though the brewery collector was shot, but whether out of revenge for some personal wrong done to his assailant or by mistake or accident did not appear, and there was no fact or circumstance from which it could be reasonably inferred that the shooting had some connection with the collector's employment.

The present case is clearly distinguishable from the cases referred to in which compensation was denied, in that it cannot be properly said here that there was any malicious design on the part of the German naval forces against Foley or any other passenger, and it may be safely assumed that the prime object of the German naval forces was to destroy the enemy's ship and not the lives of its passengers.

It is said that the attack made on the *Lusitania*, from a humane and civilized standpoint, was barbarous and cruel and in violation of the law of nations, and that therefore the act of torpedoing the steamer was not within the contemplation of the employer, when the risk of going by such steamer was undertaken by its agent Foley.

We do not think that the lawfulness or unlawfulness of the conduct of the German naval officers affects the matter at all. If the *Lusitania* had been attacked by a German cruiser and instead of surrendering, offered resistance or attempted to run away and thereupon the German cruiser, by a well-directed shot, struck the steamer in a vital part, causing her to sink, and Foley to lose his life, it would hardly have been contended by respondent that the death of Foley was not due to an accident arising out of his employment. Foley's employer knew that the former had taken passage on a British ship and that such ship was subject to the risk of capture by the German naval forces, in what manner that might be accomplished was unimportant, so long as the employer was aware of the risk. Whether the ship was destroyed by lawful or unlawful means is immaterial.

We think, therefore, that Foley's death was due to an accident while in the course of his employment and that such accident arose out of his employment.

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The judgment of the Court of Common Pleas is reversed and the case is remanded to that court to be proceeded with, according to law.

HARRY B. FORD, PROSECUTOR, v. JAMES S. GILBERT ET AL., COMMISSIONERS, AND JOSEPH R. MALONE, CITY CLERK OF THE CITY OF BORDENTOWN, RESPONDENTS.

Submitted July 6, 1916—Decided December 28, 1916.

1. Under the sixteenth section of the Commission Government act (*Pamph. L.* 1911, p. 462) and the supplement of 1915 (*Pamph. L.*, p. 622), regulating the matter of the presentation and passage of an "initiative ordinance," the first step in which is the filing of a petition with the city clerk, signed by fifteen per cent. of the voters of the city at the last general election, it is the duty of the city clerk to examine the petition to ascertain if it conforms to the requirements of the act, and if he determines that the petition does not so conform, he must return it to the agent who filed it for correction, after which correction it may again be filed within ten days of its return.
2. By section 11 of the supplement of 1915 (*Pamph. L.*, p. 630) the clerk is required, if he believes a petition is defective, and before returning it, to present his objections to the justice of the Supreme Court holding the circuit in which the municipality is situated, who is to pass upon such objection summarily, and make an order sustaining or overruling the objection.
3. Where a petition for an "initiative ordinance" was filed with the city clerk, signed by the requisite number of voters, and later another petition, signed by some of those who signed the original, was filed, asking that their names be withdrawn therefrom, and the city clerk then certified to the board of commissioners that the petition first filed was insufficient, such action was wholly without authority, and a resolution of the board of commissioners, granting the request of withdrawal, and directing the clerk to strike from the original petition on file the names sought to be withdrawn, will be set aside.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

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For the prosecutor, *John H. Hutchinson, Joseph S. Swaim*
and *James V. Herron*.

For the respondent, *Nelson B. Gaskill*.

The opinion of the court was delivered by

KALISCH, J. The prosecutor seeks in this proceeding to reverse the action of the city clerk of Bordentown, who, on a petition filed by the prosecutor for an initiative ordinance, certified as follows:

“BORDENTOWN, N. J., May 31st, 1915.

“*To the board of commissioners of the city of Bordentown:*

“This is to certify that I have examined the attached petition for an ‘initiative’ ordinance and find that it is insufficient as required by the act regulating and providing for the government of cities, towns, boroughs and other municipalities within this state, chapter 221, laws of 1911, and supplements thereto.

JOSEPH R. MALONE, *City Clerk*.”

The petition was filed on May 21st, 1915. It is conceded that at the time the petition was filed there was attached to it the requisite number of signers, namely, fifteen per cent. of the voters of the city at the last general election.

The statutory period of ten days within which it was the duty of the city clerk to examine the petition and certify to the commissioners the sufficiency of the signers expired at midnight on May 31st, 1915. It appears that late in the afternoon of that day, and prior to the meeting of the commissioners, there was presented to the city clerk a petition signed by twenty-one voters who had signed the original petition, stating that they had signed such original petition under a misapprehension and asking that their names be withdrawn therefrom.

The petition was filed under the sixteenth section of an act entitled “An act relating to, regulating and providing for the government of cities, towns, boroughs and other municipalities within this state,” approved April 25th, 1911 (*Pamph. L.*, p. 462), which section provides as follows: “Any pro-

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posed ordinance may be submitted to the board of commissioners by petition signed by electors of the city equal in number to the percentage hereinafter required. The signatures, verification, authentication, inspection, certification, amendment and submission of such petition shall be the same as provided for petitions under the last section." (The section referred to is section 15 of the act, page 476, under the caption, "Recall.") Section 16 then further prescribes, that if the petition accompanying the proposed ordinance be signed by electors equal in number of fifteen per centum of the votes cast at the last preceding general election, and contains a request that the said ordinance be submitted to a vote of the people if not passed by the board of commissioners, it shall be the duty of the board either to pass such ordinance or call a special election, unless a general election is fixed within ninety days thereafter, at which election, either general or special, such ordinance shall be submitted without alteration to the vote of the electors of the city.

In April, 1915, the legislature passed a supplement to the act of 1911, entitled "A supplement to an act entitled 'An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by the board of commissioners or improvement commissioners in this state,' approved April 25th, 1911, the title of which was amended to read as above by act approved April 2d, 1912." *Pamph. L.* 1915, p. 622.

The act of 1915 makes some changes in the procedure prescribed in the act of 1911. The act of 1915 is applicable to the present proceeding. The provisions contained therein as to recall petitions are also applicable to provisions to initiative ordinances.

Now, again referring to the undisputed facts of the case, it appears that upon the presentation of the petition asking for the withdrawal of the names of the petitioners from the original petition, the city clerk prepared a certificate of insufficiency and at the meeting of the commissioners on that night presented to the commission the petition, withdrawing signatures from the original petition without first presenting

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the original petition filed with him. The commissioners then proceeded to pass a resolution granting the request for withdrawal and authorized the clerk to strike from the original petition on file the names of those signers thereto who requested such withdrawal.

The city clerk and commissioners appear to have acted in a wholly unauthorized manner.

Section 2 of the act of 1915, page 623, makes it the duty of the city clerk to examine the petition to ascertain if it conforms with the requirements of the act. It accords him ten days within which to complete his examination after the receipt of the petition. If he determines that the petition does not conform with the requirements of the act, then he is charged with the duty to return it to the agent or agents who filed it for the purpose of correction, which correction may be made and the petition again filed within ten days of its return by the clerk.

And, by section 11 (on p. 630), the clerk is required, if he shall believe a petition to be defective, and before returning it, to present his objections, in writing, to the justice of the Supreme Court holding the circuit in which the municipality is located. The justice is required to proceed summarily to examine the objections of the city clerk and to forthwith make an order sustaining or overruling any or all of the objections, which order is final and binding on all parties concerned.

It is not pretended in the present case that any of the requirements of the statutes referred to were complied with in that regard.

In lieu of following out the provisions of the act, the clerk took it upon himself to present the withdrawal petition to the commissioners, and after the resolution was passed by the commissioners permitting the withdrawal of twenty-one of the original signers, he issued his certificate that the petition was insufficient.

The statute imposes the duty upon the clerk to examine the petition and ascertain whether it is in conformity with the requirements of the statute. After he has done this if he

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accepts and files the petition the first step in the matter is completed and jurisdiction vests. It is then too late for signers to withdraw.

Currie v. Atlantic City, 66 N. J. L. 140; affirmed by the Court of Errors and Appeals (on p. 671). See also *Wilson v. Collingswood*, 80 Id. 626, where Mr. Justice Parker has collated the cases upon the subject under discussion.

The resolution of the board of commissioners permitting twenty-one of the signers to withdraw from the original petition was unwarranted.

It is, however, clear that full relief cannot be given to the prosecutor under this proceeding. It appears that the original petition is on file with the clerk. If the clerk fails or refuses to perform the duties required of him by statute, *mandamus* is the proper remedy to enforce obedience.

The resolution of the board permitting the withdrawal of signers to the original petition filed with the clerk will be set aside, with costs.

ALFRED M. HESTON, CUSTODIAN, &c., PROSECUTOR, v.
STATE BOARD OF EDUCATION AND BOARD OF EDU-
CATION OF ATLANTIC CITY, RESPONDENTS.

Submitted December 21, 1915—Decided July 26, 1916.

Under section 76 of the act relating to schools (*Comp. Stat.*, p. 4746), the custodian of school funds, who has on hand balances derived from the sale of school bonds authorized to be issued and which were issued for the purchase of land and the erection of school buildings, cannot be lawfully directed by the board of education to transfer such balances to the building and repair account and thus subjected to be used for repair of school buildings, &c. Since the statute makes no provision permitting such use of the unexpended balances, the general principle of law that a fund raised for a specific purpose cannot be applied to any other purpose applies, and the order of the board of education to make any use of the fund other than for the specific purpose for which it was raised is *ultra vires*.

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On *certiorari*.

Before Justices PARKER, MINTURN and KALISCH.

For the prosecutor, *Theo. W. Schimpf*.

For the respondent, *James H. Hayes*.

The opinion of the court was delivered by

KALISCH, J. On this review the question presented is whether under section 76 of the act relating to schools (*Comp. Stat.*, p. 4746) the custodian of school funds, who has on hand balances derived from the sale of school bonds authorized to be issued and which were issued for the purchase of land and the erection of school buildings, can be lawfully directed by the board of education to transfer such balances to the building and repair account and thus subject such balances to be used for repair of school buildings, &c. Section 76 provides that whenever a city board of education decides that it is necessary to raise money for the purchase of lands for school purposes or for erecting, enlarging, repairing or furnishing a school house or school houses, it shall prepare and deliver to each member of the board of school estimate of such school district, a statement of the amount of money estimated to be necessary for such purpose or purposes; and that the board of estimate shall then fix and determine the amount necessary therefor and shall make two certificates of such amount, one of which shall be delivered to the board of education and the other to the common council, board of finance or other body in the city having the power to make appropriations of money raised by tax in such city. When that has been done the common council, board of finance or other body may appropriate such sum or sums for such purpose or purposes in the same manner as other appropriations are made by it. The section then further provides, as one of the methods by which funds may be raised to meet the appropriations, for the issuance of "school bonds" and further requires that the proceeds of sale of such bonds shall be de-

posited with the custodian of school moneys of such district and shall be paid out only on the warrants or orders of the board of education.

It was under this section that the board of school estimate of Atlantic City certified three amounts to the common council of that city as needed to build three different new schools. The common council made the necessary appropriations for the purposes required and issued bonds and raised the money. The schools were built and in each case there was an unexpended balance. The unexpended balances aggregate \$8,360.40. The board of education of Atlantic City, by resolution, directed the predecessor of the prosecutor, the former being at that time the custodian of the school funds, to transfer and deposit the bond balance to the credit of the "building and repair account of the school district," in accordance with the opinion of the assistant commissioner of education, which was as follows: "It is ordered that the respondent transfer to the building and repair account the balances now in his hands from the sale of the school bonds issued for the purchase of land and the erection of buildings for the Massachusetts Avenue School, the Richmond Avenue School and the Texas Avenue School."

The then custodian of the school funds refused to comply with the order and appealed to the state board of education, which board affirmed the order of the commissioner of education. The order above recited, made by the board of education, cannot be sustained upon fundamental legal grounds. The appropriations made by the common council were for the distinct purpose of purchasing land and erecting three school buildings. This was the object as stated by the board of education to the board of estimate, and it was upon the certificates presented to the common council by the board of estimate, as to the estimated cost of the parcels of land to be purchased and the schools to be erected, that the common council acted and made the appropriations and authorized the issuance of the school bonds. Of course, it was not to be expected that the estimated cost would be the exact cost. That there might be an unexpended balance was something

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that was probable and reasonably to be anticipated. But the fact that there is an unexpended balance remaining cannot have the legal effect of empowering the board of education to divert any part of such appropriation from its original design, unless there is some statutory authority permitting it. The statute makes no provision permitting the use of the unexpended balance for repairs and therefore the order of the board of education to transfer the unexpended balance to the "building and repair account of the school district" is *ultra vires*.

In *Hoboken v. Phinney*, 29 N. J. L. 65 (on p. 67), Mr. Justice Haines said: "Upon general principles of law, a fund raised for a specific purpose and placed in the hands of an officer for such specific purpose, cannot lawfully be applied to any other. Any such other appropriation would be a violation of the trust, and so contrary to the law." Although the case cited was one where the township committee expended for other purposes than those of education the money raised or appropriated for a school, the legal principle stated therein is applicable to the situation presented here.

That it was the intention of the legislature, under section 76, to restrict the board of education to use the appropriations for the specific purposes for which they were obtained, is to be gathered from the case of *Lambertrille v. State Board of Education*, 87 N. J. L. 196, where the Court of Errors and Appeals, speaking through Mr. Justice Swayze, says: "Moreover, although section 76 does not in terms require an itemized statement, it requires the board of education to deliver to each member of the board of estimate a statement of the amount of money estimated to be necessary for the purpose or purposes. The obvious intent was to enable the board of estimate to act intelligently in fixing and determining the amount necessary for such purpose or purposes. It would be quite impossible for the board of estimate to act intelligently upon a certificate which included in a lump sum the amount necessary for purchase of land and erecting a new school house, and the amount necessary for repairs to existing school houses. An appropriation made in that way would

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put it in the power of the board of education to expend the whole appropriation for repairs."

The same principle is to be extracted from *Loudenslager v. Atlantic City*, 80 N. J. L. 658. We have deemed it unnecessary to consider the other points made and relied on by the prosecutor in his brief, because we have reached the result that the order made by the board of education and affirmed by the state board of education was without warrant in law, and, therefore, should be set aside.

KELLS MILL AND LUMBER COMPANY, INCORPORATED,
A CORPORATION, PLAINTIFF-APPELLEE, v. THE PENN-
SYLVANIA RAILROAD COMPANY, A CORPORATION,
DEFENDANT-APPELLANT.

Argued November 3, 1915—Decided July 22, 1916.

1. The state courts have jurisdiction in actions brought independently of the federal statutes for some wrong done, where the federal statutes come incidentally into operation by reason of some regulatory provision contained therein and where the action itself is brought neither for a violation or enforcement of the federal statute nor for the purpose of assailing the validity or legal efficacy of the provisions of the federal statute.
2. An action of replevin may be brought in a state court to recover certain goods in the custody of a carrier, although the goods were shipped from one state to another, and the demurrage charges, by reason of the refusal to pay which led the carrier to refuse delivery, were governed by tariffs filed with the interstate commerce commission under the federal statute.

On appeal from the First District Court of Jersey City.

Before Justices PARKER, MINTURN and KALISCH.

For the appellant, *Vredenburg, Wall & Carey*.

For the appellee, *Maximilian T. Rosenberg*.

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The opinion of the court was delivered by

KALISCH, J. Judgment was given in the First District Court of Jersey City, in an action of replevin, in favor of the plaintiff and against the defendant. From that judgment the defendant company has appealed to this court. The replevin action grew out of the refusal of the appellant company, through the captain of a canal boat, to deliver certain lumber unless a demurrage charge was paid. Whether or not a demurrage charge had accrued was in dispute between the parties. The court found from the testimony that no demurrage charge had accrued.

The appellant further contended that the facts show that the shipment of the lumber was interstate, and therefore the case was not cognizable in the state courts but only in the federal courts or by the interstate commerce commission.

The shipment was interstate and consisted of about fourteen thousand feet of white cedar lumber. It was shipped by Roper Lumber Company from Norfolk, Va., to the plaintiff at Brooklyn, the appellant company being the terminal carrier. The lighterage from Jersey City to Brooklyn was done for the appellant by a lighterage company by means of a canal boat. This canal boat arrived at the plaintiff's dock in Brooklyn on July 29th, 1915, at one thirty p. m. The plaintiff under the rules regulating this transportation and agreement had forty-eight hours within which to have its lumber unloaded before any claim for demurrage could be made. The time, therefore, for unloading expired on July 31st, 1915, at one thirty p. m. The carrier, concededly, was to do the unloading. The lumber was not unloaded within the forty-eight hours and the captain refused to continue the unloading, after the expiration of the forty-eight hours, unless he were paid a demurrage charge of \$10.

Before taking up the consideration of the jurisdictional question raised by the appellant, we will turn our attention, briefly, to the controversy relating to the demurrage charge.

In the schedule filed by the appellant company relating to freight shipments with the interstate commerce commission, there appears a rule, which, among other things, provides

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that a consignee of goods must provide a berth to receive them, and that forty-eight hours from the time the car float, lighter or barge reports (Sundays and full holidays excepted) shall be deemed lay days without charge, and that after the expiration of the forty-eight hours demurrage shall accrue, &c., and according to the rates fixed in the schedule.

The legal efficacy of this rule and its application to the shipment in this case are not challenged. The facts, however, upon which the attempted collection of the demurrage tax, provided for by the rule, was claimed, were in dispute. The dispute presented two controverted questions of fact. For the appellant it was insisted that the consignee, the plaintiff below, failed to provide a berth for the boat, so that it could unload the lumber within forty-eight hours after it was reported, and that that was the reason why the demurrage accrued.

This was denied by the plaintiff below, who claimed that it had provided a dock for the delivery of the lumber in ample time for the captain of the boat, if he had used reasonable diligence, to have unloaded it within forty-eight hours after the boat was reported.

The trial judge found that the plaintiff below provided a dock in ample time, after the boat was reported, for the captain to have delivered the lumber within forty-eight hours, and that the cause of his failure to do so was due to the fact that he did not use reasonable diligence in unloading.

If there is any testimony to support the findings of the trial judge, they will not be disturbed, under the decision of the courts of this state. An examination of the record shows that there was testimony tending to establish that the plaintiff below provided a berth for the delivery of the lumber, and notified the captain of the boat to start unloading the lumber at that berth on Saturday morning at seven thirty o'clock, and that the plaintiff below would have its teams there at that time to haul the lumber away; that the teams of the plaintiff below were at the dock on Saturday morning, at the time mentioned, but the captain of the boat did not start to unload until two hours later, and that the lumber was hauled

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away as fast as it was unloaded. There was also testimony to the effect that the boat could have been unloaded by two men working with reasonable diligence within three or four hours. This testimony supported the findings of the trial judge.

We now turn to a consideration of the challenge made by the counsel for appellant to the jurisdiction of the state court to entertain the present action.

The argument advanced by counsel for appellant is, in substance, that the shipment being interstate, the demurrage which was claimed to have accrued is governed exclusively by the provisions of the Interstate Commerce act (*U. S. Comp. Stat.* (1916), §§ 8563-8604) and the tariff filed with the interstate commerce commission in pursuance thereof, hence the state court is without jurisdiction because it was not within the power of the state court to decide whether demurrage had or had not accrued under the schedule filed by the appellant, but that that power was exclusively conferred by congress upon the interstate commerce commission or the federal court. This position is manifestly untenable. The cases cited by counsel for appellant to sustain the novel proposition urged upon us not only utterly fail in that respect, but on the contrary clearly recognize the jurisdiction of the state courts to deal with matters which are, or may be, in a measure regulated and governed by the Interstate Commerce act or the Carmack amendment. The courts of this state have repeatedly dealt, unquestioned, with matters governed by these federal acts. *Spada v. Pennsylvania Railroad Co.*, 86 N. J. L. 187; *Olivit Bros. v. Pennsylvania Railroad Co.*, 88 *Id.* 241; *Carr et al. v. Pennsylvania Railroad Co.*, *Id.* 235.

There is nothing in either of the federal acts invoked which either expressly or impliedly forbids the state court from entertaining jurisdiction in a case like the one under discussion. The fallacy of the theory that the state court is without jurisdiction lies in the failure to properly distinguish between actions which are brought for violation or enforcement of the provisions of the federal statutes referred to, and which for that reason are only cognizable in the federal tri-

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bunal, and actions at law brought independently of the federal statutes for some wrong done, and the federal statutes come incidentally into operation by reason of some regulatory provision contained therein, as in the case *sub judice*. In the former class of actions there is no doubt but that the federal courts and interstate commerce commission have exclusive jurisdiction, but not so in the latter.

The action which the plaintiff below instituted was not one dealing with discrimination in rates or the like, but that the appellant's charge for demurrage in this particular case was not warranted by its own regulation, that is, that it charged for something not contracted for.

This was, obviously, not assailing the legal efficacy of the rule or tariff regulation. If the carrier had delivered the lumber and sued for demurrage, is there any question but that the state court could have entertained jurisdiction? We think not.

Having dealt with the reasons solely relied on in the appellant's brief for a reversal of the judgment, and finding them to be without merit, the judgment will be affirmed, with costs.

NEWARK EXPRESS AND TRANSPORTATION COMPANY,
APPELLANT, v. DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY, APPELLEE.

Argued November 3, 1915—Decided August 9, 1916.

1. The federal "River and Harbor act" (*U. S. Comp. Stat.* 1901, p. 3540) is silent on the subject of closing bridges over navigable streams for the purpose of repairing, and has not superseded the statutes of this state in that regard.
2. The act of 1892 (*Pamph. L.*, p. 435), amending the act respecting bridges, authorizes the obstruction of navigation over navigable streams made necessary by repairs to any bridge or viaduct over the same, and expressly exempts any corporation or person so repairing such bridge or viaduct from liability for damages occasioned by obstructing or stopping navigation thereby, provided such repairs and obstructing be done between February 1st and February 20th.

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3. The supplement to the act respecting bridges, enacted in 1896 (*Pamph. L.*, p. 250), which fixes the time within which needed repairs, &c., may be lawfully made between November 1st and January 1st, contains a proviso that the act shall not apply to any navigable river or water where the depth where any bridge is erected exceeds four feet six inches at mean high tide. *Held*, that the act of 1896 does not cover the entire subject legislated upon by the act of 1892 (*Pamph. L.*, p. 435), and as both statutes are in *pari materia*, the passage of the act of 1896, although it contained a general repealer of all acts inconsistent therewith, did not repeal the act of 1892.

On appeal from the First District Court of Newark.

Before Justices PARKER, MINTURN and KALISCH.

For the appellant, *J. Harry Hull*.

For the appellee, *Walter J. Larrabee*.

The opinion of the court was delivered by

KALISCH, J. The appellant, the plaintiff below, was engaged in the transportation of freight by boats on the Passaic river. It brought its action against the railroad company, the defendant below, for damages based upon the allegations that the railroad company, which maintained a railroad bridge with a draw across the Passaic, closed the drawbridge to navigation for three days, so that certain of the appellant's boats were prevented from passing beyond the bridge, and that in consequence thereof the appellant was unable to move freight up and down the river, &c.

It was stipulated between the parties that the depth of the river where the bridge is erected exceeds four feet and six inches at mean high tide; that the railroad company closed the drawbridge for a portion of three days in the year of 1913, namely, on the 12th, 13th and 14th of February; that the drawbridge was closed on the days in question for the purpose of enabling the railroad company to make necessary repairs; that such repairs could not be made without closing the drawbridge; that notice was given and published in the

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Newark Evening News, a newspaper circulating in Essex county, and the Jersey City Evening Journal, a newspaper circulating in Hudson county, in this state, on the 11th, 18th and 25th days of January, 1913, of the intention of the railroad company to make the necessary repairs between February 10th and 19th, 1913; that the drawbridge was a lawfully existing structure prior to the passage of the act of congress, approved March 3d, 1899 (30 Stat., p. 1151; U. S. Comp. Stat. 1901, p. 3540), known as the "River and Harbor act;" that the railroad company did not obtain from the secretary of war of the United States and did not apply to him for permission to close the drawbridge; that when application is made to the war department of the United States for permission to close drawbridges over navigable waters under the jurisdiction of the United States for repairs, the invariable reply is that there is no law of the United States that empowers the secretary of war to authorize the closing of a bridge to navigation while repairs are being made, but recognizing the fact that repairs are necessary, it has been the practice of the war department to notify the owners and operators of bridges, when application is made for permission to close them for repairs, that no action will be taken against them for obstructing navigation during the reasonable time necessary for doing the work, it being understood that the parties thus closing the bridges may be responsible in damages for any injury inflicted upon private interests by such acts.

There was also admitted in evidence, by consent of the parties, a copy of section 5 of the act of congress approved August 18th, 1894, known as the "River and Harbor act," and the amended rules and regulations to govern the opening and closing of drawbridges across Newark bay, Passaic and Hackensack rivers, and their navigable tributaries, and it was stipulated that the rules and regulations were in effect on the 12th, 13th and 14th days of February, 1913.

Upon examination of the Harbor act, we find that it imposes a penalty upon every person who shall willfully fail or refuse to open or cause to be opened the draw of a bridge

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across navigable waters of the United States for the passage of a boat or boats, &c., and also points out a procedure for the enforcement of the act in the federal tribunal.

We are unable to perceive any application of this act to the facts of the present case. Nor do we think that the rules and regulations promulgated by the secretary of war have any pertinency to the issue before the court. The rules concern the management of the drawbridge in its relation to the passing of trains carrying the United States mail and of vessels navigating the stream and to general traffic over the bridge, but are silent as to obstructions caused for the purpose of making necessary repairs.

Upon the stipulated facts and on testimony taken in addition thereto the trial judge found that the railroad company had complied with the statutes of this state and performed the work of repair without unreasonable delay, and that therefore the appellant was not entitled to recover any damages, and thereupon gave judgment in favor of the defendant.

It is conceded that the railroad company closed the draw to make the necessary repairs in compliance with the act of 1892 (*Pamph. L.*, p. 435), which is entitled "An act to amend an act entitled 'A further supplement to an act entitled "An act respecting bridges,"'" approved April 10th, 1846; approved March 24th, 1874; approved April 3d, 1891, and which reads as follows: "That whenever it shall be necessary to repair or rebuild any bridge or viaduct in this state over any navigable river or water, the public authorities, corporation or person so repairing or rebuilding such bridge or viaduct, shall not be liable for damages occasioned by obstructing or stopping navigation thereby; *provided*, the said repairs or rebuilding and obstructing or stopping of navigation be done between the first day of February and the twentieth day of February; *and provided further*, that said repairs or rebuilding be prosecuted with all practical dispatch; *and provided further*, that notice of such intended repairs or rebuilding be given at least three weeks prior to commencing the same by publishing a notice thereof in some

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newspaper circulating in the county adjacent to such bridge or viaduct."

No such provision is found in the Revision of 1846, and its first appearance is made in the act of 1874 (*Pamph. L.*, p. 90), which is entitled "A further supplement to an act entitled 'An act respecting bridges,' approved April 10th, 1846." During the period intervening between the years 1874 and 1892, the legislature caused several changes to be made in the provision of the act of 1874, but these changes related to the time when and within which repairs, &c., to bridges could be lawfully made, and expressly excepted Monmouth county from the operation of the act of 1874. In the act of 1874, the lawful period fixed by the legislature, during and within which repairs, &c., could be made, was between the 1st day of January and the 1st day of March. Then followed the act of 1891 (*Pamph. L.*, p. 312), which is entitled "An act to amend an act entitled 'A further supplement to an act entitled 'An act respecting bridges,' approved April 10th, 1846; approved March 24th, 1874.'" This act appears to be in the same language as that of the act of 1874, with this exception, that it changed and limited the lawful period prescribed by the act of 1874 in which repairs, &c., could be done to days between January 15th and February 15th. In all other respects the two acts referred to are the same.

A comparison of the context of the act of 1892 with the acts of 1874 and 1891 will show that one of the purposes intended to be accomplished was to change and shorten the period of time at and within which needed repairs, &c., could be made on bridges over navigable streams, as fixed by the act of 1891, and to limit the time for the making of such repairs, &c., to the days between February 1st and February 20th. It is to be observed, however, that there is no exception of Monmouth county from the operation of the act as in the acts of 1874 and 1891, and that the act contains an express clause repealing all acts or parts of acts inconsistent therewith.

But in 1896 the legislature (*Pamph L.*, p. 250) enacted a law entitled "A supplement to an act entitled 'An act re-

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specting bridges,' approved March 24th, 1874," which differs from the acts above mentioned in the following respects: It fixes the time at and within which needed repairs, &c., may be lawfully made under its provision between the 1st day of November and the 1st day of January, and adds the proviso, "that this act shall not apply to any navigable river or water where the depth of water of said river or water in the channel thereof where any bridge is now erected exceeds four feet six inches at mean high tide," and also contains a general repealer of all acts or parts of acts inconsistent therewith.

Counsel for appellant contends that the act of 1892 did not legally warrant the railroad company to close the draw for needed repairs for two reasons—*first*, that the River and Harbor act, and the rules and regulations adopted by the secretary of war regarding navigable waters have superseded the act of 1892, and since congress may legislate to the exclusion of New Jersey respecting drawbridges over the navigable waters of that state, the act of 1892 has become a nullity; *secondly*, that the act of 1892 was superseded by the act of 1896, and therefore the former act afforded no valid defence to the appellant's action.

We have had occasion to state in the earlier part of this opinion that the River and Harbor act, and the rules and regulations referred to, have no application to the facts of the case.

We have not been referred to any legislation of congress on the subject-matter embraced in the state statutes, regarding the making of necessary repairs, &c., to drawbridges over navigable waters. The state legislation tends to protect life and property, and we find therein nothing inconsistent with the River and Harbor act and the rules and regulations adopted by the secretary of war.

It appears, in the case *sub judice*, as a conceded fact that the consent of the secretary of war is invariably given when asked for to close bridges when repairs, &c., are necessary, accompanied by the statement that the parties closing the bridges may be responsible in damages for any injury inflicted

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upon private interests by such acts. The state, however, to meet the difficulty which the suggestion of liability for damages for injury to private interests from the closing of the draws might entail upon the parties temporarily and necessarily closing the same has pointed out in a statute under what circumstances and within and at which time during the year such repairs, &c., may be made; and further that when the statutory requirements are complied with, the parties necessarily making such repairs, &c., shall not be liable for damages occasioned by obstructing or stopping navigation.

In other words, the statute in effect suspends the remedy existing at common law to recover damages for an injury sustained by a private interest, when the circumstances pointed out by the statute exist and the directions of the statute have been followed. We can see no legally sound objection to this species of legislation, which appears to be largely in the interest of public safety, unless it conflicts with some provision of the constitution of the state or United States, and as no claim has been made that the act is unconstitutional, we have not deemed it necessary to consider its constitutional aspect. It is next urged by the appellant that the act of 1892 was superseded by the act of 1896. This assertion he bases upon a note to section 29 of the act relating to "bridges" (1 *Comp. Stat.*, p. 309), which note is, in substance, that previous provisions, similar to those as embraced in section 29 (which section is the act of 1896), contained in the supplement (*Pamph. L.* 1874, p. 90, amended by *Pamph. L.* 1891, p. 312), which was amended by *Pamph. L.* 1892, p. 435, are superseded by that section.

There has been no judicial declaration by the courts of this state to that effect. No such construction can be properly given to the act of 1896, as we shall proceed to demonstrate. It is a fair inference that the reason for the amended act of 1892 was to include the bridged navigable waters of Monmouth county, the only county in this state which had been theretofore excluded from the benefit of the provisions contained in said act, within the statutory regulation. In order to accomplish this, the legislature, under the constitu-

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tion of this state, was required to pass an act, general in its terms, which it did. Likewise, as has already been pointed out, the legislature shortened the period of time at and within which parties were entitled to make repairs to bridges, &c., as was previously allotted for that purpose by the statute of 1891. After the passage of the act of 1892, the status of all bridged navigable waters of this state as to the terms under which the time when and the period within which the public authorities, corporation or person repairing or rebuilding a bridge of the character alluded to were and was permitted to make such repairs, &c., was fixed and determined.

It is a matter of common knowledge that the bridged navigable waters of this state comprised bodies of water upon some of which by reason of the depth of the channel there is considerable traffic all the year, with the exception, maybe, of some of the winter months. It is also a matter of common knowledge that some of these larger bodies of water are used, and capable of being used, for the transportation of ships of large tonnage, whereas the smaller streams are limited in their capacity of transportation and the number, size and character of the boats that can make use of the same. It follows, therefore, that from a maritime standpoint it was important to determine at what season of the year repairs, &c., could be made, with the least interruption to navigation. This the legislature did when it fixed twenty days for that purpose in the month of February of each year. And so the situation remained unchanged until the passage of the act of 1896. Now, it may very well be that during the four years which intervened between the act of 1892 and the act of 1896, it was found that the regulations which applied to bridges over large navigable waters were unsuitable to bridges over shallow streams. That the legislature, at least, thought so is made manifest by the fact that by the act of 1896 the bridged navigable waters of this state were divided into two classes—bridged navigable waters where the channel thereof exceeds four feet six inches at mean high tide, and bridged navigable waters where the channel thereof does not exceed that

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measure. The legislature, obviously, had in view that on the smaller bodies of water the traffic was lighter, the boats of less size and tonnage than on the larger bodies of water, and that, therefore, the time for and within which to make repairs, &c., over these lesser bodies could be made more conveniently by the public authorities or parties interested, and with less interruption to navigation, if made at a different season and within a longer period of the year than was prescribed by the act of 1892, indiscriminately, for all bridged navigable waters. This change in time might have been based by the legislature upon general experience that smaller streams were apt to freeze up or be blocked with ice much earlier during the cold season of the year than larger bodies of water, and hence, repairs, &c., to bridges during the months of November and December would interfere but little with navigation, if at all.

Unless we are prepared to say that it was the intention of the legislature to regulate all bridged navigable waters, irrespective of the fact whether or not the depth of the channel of such waters exceeded four feet six inches at mean high tide, we are forced to give the act of 1896 a construction which is palpably absurd.

For, it must be borne in mind that the legislation we are discussing is in the nature of a police regulation of the state, adopted by it for the protection of life and property.

What sound reason, therefore, can there be ascribed to the action of the legislature for abandoning state control of the bridges over navigable waters of this state where the depth of the channel exceeds four feet six inches at mean high tide? Such bridges are subject to become out of repair; the danger to life and loss of property is just as great from a bridge which is out of repair, over a stream where the depth of the channel is four feet seven inches at mean high tide, as from a bridge out of repair over a stream where the depth of the channel is only four feet six inches.

The theory broached by the appellant that the legislative design was to substitute the act of 1896 for the act of 1892, because the act of 1892 was in conflict with the River and Harbor act, is clearly not tenable. For, if the act of 1892 was

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in conflict with the federal statute invoked, then the act of 1896 is also in conflict therewith. In respect to the federal statute, and the rules and regulations of the secretary of war, it appears they do not differentiate between bridged navigable waters, where the depth of the channel exceeds four feet six inches at mean high tide and where it does not. But a more conclusive answer to the contention of counsel for appellant that the act of 1892 was repealed by the act of 1896 is to be found in the fact that the act of 1896 does not cover the entire subject legislated upon by the act of 1892. Both statutes are in *pari materia*. By a well-recognized canon of statutory construction, if the act of 1896 is not repugnant to the act of 1892, so that both acts may consistently stand together, then the act of 1892 remains in force. In a note to *Pott. Dwar. Stat.* (ed. 1871) 155, the commentator says: "To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled." See cases cited in note. But if they can be consistently reconciled they will be construed as one act. *Farrell v. State*, 54 N. J. L. 421; *Barnaby v. Bradley & Currier Co.*, 60 Id. 158; *Harrington Sons v. Jersey City*, 78 Id. 610; *Walker v. Freeholders of Essex*, 82 Id. 348.

We find no difficulty in reconciling both acts. The only effect that the act of 1896 has on the act of 1892 is to confine the operation of the act of 1892 to bridged navigable waters where the mean high tide exceeds four feet six inches.

The proviso of the act of 1896, in express terms, limits the application of the act of 1896 solely to bridged navigable waters where the mean high tide does not exceed four feet six inches.

We have examined the other matters relied on for a reversal of the judgment and find them to be without merit.

The judgment will be affirmed, with costs.

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NEWARK HAIR AND BI-PRODUCTS COMPANY, A CORPORATION, PROSECUTOR, v. SARAH FELDMAN AND THE COURT OF COMMON PLEAS IN AND FOR THE COUNTY OF ESSEX, DEFENDANTS.

Submitted July 6, 1916—Decided December 28, 1916.

1. Where decedent was in her master's place of business in the course of her employment as stenographer, within a time during which she was employed, when a fire occurred which caused her death, the death was caused by an accident in the course of the employment.
2. Where a fire broke out in the lower floors of the building in which the employer had his place of business, and over which he had no supervision or control, and the conditions of the premises for escape in case of fire were such as would warrant a conclusion that the danger to employes in case of fire, whether on the premises of the employer or on one of the floors beneath, was a danger to be reasonably anticipated by the employer, such a danger was one incident to the employment and an injury resulting from the fire was an injury arising out of the employment.
3. In the class of cases coming under the Workmen's Compensation act, the facts of each case must be considered free from the influence of the well-settled legal principles governing cases of negligence, and such cases must be dealt with in accordance with a state policy of social insurance, in which the doctrine of negligence has no abiding place.

On *certiorari* to Essex Common Pleas Court.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *George P. Laible* and *Frank S. Katzenbach, Jr.*

For the defendant, *William P. Murphy.*

The opinion of the court was delivered by

KALISCH, J. The question mooted in this case is whether the proof justified a finding by the learned trial judge that the death of the petitioner's decedent was the result of an

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accident arising out of and in the course of the employment of the deceased.

The deceased was a stenographer in the employ of the prosecutor. The prosecutor occupied the fourth floor of the building for the conduct of its business which was the preparation of animal hair and its bi-products for commercial purposes. It had no control over the lower floors. A fire originating in one of the lower floors sent up the stairway leading to and from the fourth floor such great volumes of smoke and flame that it shut off any escape to the employes of the prosecutor in that direction.

Means of escape by a fire escape were cut off because of the density of flame and smoke issuing through an elevator shaft, which stood in the way to the fire escape. A window sash at the head of the stairway leading from the fourth floor was closed and fastened so that it could not be raised and had to be forced out. Some of the employes jumped out of a window onto the roof of a first story building adjoining. The petitioner's decedent failed in her effort to make her escape and she was so horribly burned and injured that death resulted.

The contention made by the prosecutor is that the death of the petitioner's decedent was not caused by an accident arising out of and in the course of her employment. It cannot, however, under the proof in the case, be successfully contended that the accident did not arise in the course of her employment. She was in her master's place of business in the course of her employment of stenographer, within a time during which she was employed, when the fire occurred which caused her death. These circumstances are sufficient, under *Bryant v. Fissel*, 84 N. J. L. 72, to constitute her injury an accident arising in the course of her employment. But in order to entitle the petitioner to compensation it must not only appear that the accident arose in the course of the decedent's employment, but also out of it.

Counsel for the prosecutor argues that the nature of the prosecutor's business was the manufacture of a harmless product and since the fire did not originate in the immediate

place of business it cannot be placed under a different category than that of an earthquake or lightning or any one of a multitude of conditions arising which might cause an injury.

We think that the important question is whether there was any danger to be reasonably anticipated by the employer to its employees while at work on the fourth floor from the situation and condition of the premises.

For if the risk of danger is in any manner connected with the employment, an accident happening by reason of such risk is an accident arising out of the employment. The learned trial judge had before him evidence that there was a single stairway leading from the fourth floor which stairway became useless as a means of escape from smoke and fire; that though there was a fire escape it could not be used by reason of its proximity to an elevator shaft through which fire and smoke were issuing; that a window at the head of the stairway was fastened so that it could not be raised; that the employees in order to effect their escape were compelled to jump from the fourth floor to the roof of a one-story building to save their lives. We are therefore unable to perceive how the court could have reached any other conclusion than that the danger to employees in case of fire, whether on the premises of the employer or on one of the floors beneath, was a danger to be reasonably anticipated by the employer. It was a danger incident to the employment.

The difficulty under which the trained legal mind labors, in this class of cases, is to detach itself from considering the facts of each particular case free from the influence of well settled legal principles governing cases of negligence, and to simply keep in view that we are dealing in lieu thereof with a state policy of social insurance in which the doctrine of negligence has no abiding place.

As to the point made by counsel for the prosecutor in their brief that the petitioner is not a dependent, it is to be observed that no argument is made to support this assertion. We have, however, examined the testimony on this branch of the case and find that it amply supports the finding of the trial judge that the petitioner is a dependent.

The judgment will be affirmed, with costs.

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Torrance v. Edwards.

ANNA B. TORRANCE, EXECUTRIX, &c., PROSECUTRIX, v.
EDWARD I. EDWARDS, DEFENDANT.

Submitted July 6, 1916—Decided November 9, 1916.

1. Where the language of a New Jersey statute is clear and unambiguous, the courts of this state will not go back of the language of the statute and consider the construction placed upon a similar statute by a foreign jurisdiction, especially when there is a difference in the construction in courts of sister states.
2. The true meaning of section 4 of the Inheritance Tax act (*Pamph. L. 1914, p. 269*), dealing with exemptions and the imposition of a graduated transfer tax upon decedents' estates, is that (1) the first \$5,000 shall be exempt, (2) the next \$45,000 shall be subject to a tax of one per cent., (3) the next \$100,000 shall be subject to a tax of one and one-half per cent., (4) the next \$100,000 shall be subject to a tax of two per cent., and (5) all the amount over \$250,000 shall be subject to a tax of three per cent.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutrix, *Stephen H. Little*.

For the defendant, *Theodore Backes* and *Herbert Boggs*.

The opinion of the court was delivered by

KALISCH, J. The matter in controversy in this case relates to the legality of the method of computation adopted by the defendant in ascertaining and levying an assessment under the Inheritance Tax act.

The construction of that part of section 1, paragraph 4 of the Inheritance Tax act (*Pamph. L. 1914, p. 267*), dealing with exemptions and the imposition of a graduated transfer tax upon decedents' estates is involved. The decedent, a widow, died September 3d, 1915, leaving a will by which instrument she bequeathed and devised her entire estate to her daughter, the prosecutrix.

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There is no controversy regarding the value of the estate as appraised by the comptroller.

The value of the estate, both personal and real, was appraised at \$248,152.16

Debts, expenses, &c. 9,035.30

Net for distribution \$239,116.86

Exempt interests 5,000.00

Taxable interests \$234,116.86

The tax assessed was \$3,732.34 and was computed as follows:

Exempt \$5,000.00

1% on 45,000.00 = \$450.00

1½% on 100,000.00 = 1,500.00

2% on 89,116.86 = 1,782.34

\$234,116.86 = \$3,732.34

The prosecutrix claims that the tax should have been assessed as follows:

1% on \$50,000.00 = \$500.00

1½% on 150,000.00 = 2,250.00

2% on 34,116.86 = 682.34

\$234,116.86 = \$3,432.34

It is obvious that the rule of computation contended for by the prosecutrix differs materially from the rule in that respect adopted by the defendant. By comparing the results arrived at by the two methods of computation of the tax, it appears that the result of the defendant's computation exceeds by \$300 the amount which the prosecutrix contends is legally assessable under the statute.

For the prosecutrix it was argued that the act of 1914 was copied from the New York statute on the subject, and hence that it will be assumed that the New York statute was taken by our legislature with the construction put upon it by the courts of that state.

That under the decisions of the courts of the State of New York, a method of computation such as was adopted in the present case by the defendant was held to be erroneous, whereas the method of computation as contended for the prosecutrix was declared to be the proper rule.

In this connection it becomes important to mention that the provision in the Inheritance Tax act of 1910 of the State of New York relating to the graduating of taxes was amended in 1911.

A comparison of the provision of the Graduated Tax act of New York of 1910 with the provision of section 4 of our act of 1914 will show a marked dissimilarity in language.

It was the act of 1910 which was construed in the case. *In re Jourdan's Estate* (1910), 70 *Misc. Rep.* 159; 128 *N. Y. Supp.* 728; 206 *N. Y.* 653; 99 *N. E. Rep.* 1109.

The construction given to the act of 1910, by the courts of the State of New York, is significant in that it was founded upon the use of the language employed in the act graduating the tax, for example, such as: "Upon all amounts in excess of the said \$25,000 and up to and including the sum of \$100,000."

It was on the use of the words "and including" in the act of 1910, and which are not contained in the New Jersey statute, that the New York courts rested the construction contended for by the prosecutrix.

It is true that in 1911 the New York statute was amended, and the words "and including" omitted from the provisions referred to, and that the same question that was raised in the *Jourdan Case*, *supra*, was again raised under the act of 1911 *In re Herman Schwartz*, where it was held by Surrogate Fowler that though there was a change in the language of the statute, the decision of the Court of Appeals in the *Jourdan* case was controlling. This decision was affirmed by the Appellate Division, without opinion, but not unanimously. *In re Schwartz*, 141 *N. Y. Supp.* 349; *S. C.* on appeal, 209 *N. Y.* 537; 102 *N. E. Rep.* 1113.

It is apparent that the omission of the words "and including" from the New York statute of 1911 makes the re-

semblance between the provisions of the New York and New Jersey statutes relating to the graduating tax very close.

While we recognize the force of the rule laid down in *Neilson v. Russell*, 76 N. J. L. 655; *Clay v. Edwards*, 84 *Id.* 221, and *Hopper v. Edwards*, 88 *Id.* 471, that where the legislature enacts a provision taken from a statute of another state, in which the language of the act has received a settled construction, it is presumed to have intended that such provision should be understood and applied in accordance with that construction, we do not think that this rule is applicable with full force here, since it is clear that to adopt the construction of the New York courts requires a twisting of the natural sense of the language of our act from its plain import.

Besides all this there is the fact that the State of California had a statute in 1905 to which the New Jersey statute bears a close resemblance, and, therefore, it would be an equally fair presumption that the provision in our statute relating to the graduated tax was patterned after the California statute as that it was taken from the New York statute. And as there is a strong resemblance between the provision of the New York statute of 1911 relating to the graduated tax to the one in the California statute of 1905, it may be argued with great force that the New York provision was copied from the one in California, and that the construction given by the California courts to the statute should have been followed. From an examination of the California cases it appears that the same construction was put on the provision in its statute as was exemplified by the defendant in his computation based on the New Jersey statute. See *In re Bull's Estate*, 153 Cal. 715; 96 Pac. Rep. 366 (1908); *In re Timken's Estate*, 109 Pac. Rep. 608 (Cal., 1910). Furthermore, we think the language of the provision of the statute under discussion is too plain to make it necessary to seek the interpretation placed upon a like provision by the courts of a sister state, where the act is supposed to have had its origin.

If we entertained a doubt as to the meaning of the language of the act, as expressed by the legislature, it would be incumbent upon us in dealing with a statute imposing a tax, to

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resolve that doubt in favor of the taxpayer. But we are not disturbed by any doubt. The New Jersey statute, applicable to the facts of the present case, provides that the transfer of the property shall be taxed at the rate of one per centum on any amount in excess of \$5,000 up to \$50,000. The clear meaning of this is that \$45,000 shall be subject to a one per centum tax; then one and one-half per centum on amount in excess of \$50,000 up to \$150,000. Now it is clear that the amount in excess of \$50,000 up to \$150,000 is \$100,000; therefore, \$100,000 is subject to the one and one-half per centum tax; then two per centum on any amount in excess of \$150,000 up to \$250,000. Again it is as clear as language and mathematics can make it, that the amount in excess of \$150,000 up to \$250,000 is \$100,000, and is subject to the two per centum tax; then follows the general clause, "and three per centum on any amount in excess of \$250,000."

It is quite obvious that if the theory of the prosecutrix should prevail, the three per centum clause would not be applicable until the amount was in excess of \$455,000, which is clearly against the express declaration of the statute.

The writ will be dismissed and the assessment affirmed.

CARLTON GODFREY AND HENRY WEIDERHOLD, PROSECUTORS, v. BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC, AND LIDDLE & PFEIFFER, RESPONDENTS.

Argued December 29, 1916—Decided January 24, 1917.

A resolution passed by a board of chosen freeholders provided that an award of a contract for the improvement of a county road be not binding, if chapter 285 of the laws of 1916 was adopted by the voters of the state; that, in the event said law was adopted by the voters of the state, the award and all the proceedings shall be null and void. The resolution was passed November 8th, 1916. The above act was adopted by the voters of the state at the election, November 7th, 1916. On November

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24th, 1916, at a special meeting of the board, the above resolution was repealed, disposed of, set aside and for nothing holden. A contract was awarded under the original advertisement for bids. *Held*, the award of the contract was void and illegal.

On *certiorari*.

Before Justice BLACK.

For the prosecutors, *Godfrey & Read, Clarence L. Cole and Theodore W. Schimpf*.

For Liddle & Pfeiffer, *Adrian Riker and Emerson L. Richards*.

For the board of chosen freeholders of the county of Atlantic, *Enoch A. Higbee*.

The opinion of the court was delivered by

BLACK, J. On the 8th of November, 1916, the board of chosen freeholders of the county of Atlantic, by a resolution, awarded a contract to Messrs. Liddle & Pfeiffer for extraordinary repairs or reconstruction of a permanent character, improving a county road. The proceedings were based upon *Pamph. L. 1914, p. 203, § 27, and Pamph. L. 1912, p. 809*. The bond issue is based upon *Pamph. L. 1916, p. 525*. The road leads from Absecon bridge, in the city of Absecon, to the county line, between the counties of Camden and Atlantic, being what is known as the White Horse pike, running through the towns of Hammonton and Absecon, and to that portion of the county road leading from the aforesaid road, in the city of Absecon, to the Seaview Golf Club, in the township of Galloway, being that portion of the road commonly known as Ocean boulevard, for the width of sixteen feet in the centre of the road, for the sum of six hundred ninety-three thousand four hundred and forty-three dollars and forty-eight cents (\$693,443.48), subject to the following proviso: "Provided further, that this award shall not be binding upon the board of freeholders of the county of Atlantic, nor shall any contract be entered into, nor any bonds offered for

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sale under resolution heretofore passed, to be issued for the purpose of paying for the contract herein mentioned, if chapter 285 of the laws of 1916 was adopted by the voters of this state at the election held November 7th, 1916. That in the event said law was adopted by the voters of this state, this award and all proceedings touching the work herein referred to, and the award of the bid, shall be null and void."

While the record does not show that chapter 285 of the laws of 1916 was adopted by the voters of the state, at the election held November 7th, 1916, yet on the argument this fact was admitted.

On November 24th, 1916, at a special meeting of the board of chosen freeholders of Atlantic county, another resolution was passed, viz., that the above proviso be repealed, disposed of, set aside and for nothing holden, so that the board may proceed with the entering into a contract with Messrs. Liddle & Pfeiffer according to the terms of their bid, and be it resolved, that the above proviso "be repealed, disposed of, set aside and for nothing holden and that the contract for making said extraordinary repairs herein mentioned, be awarded to Liddle & Pfeiffer for the amount of their bid, they being the lowest bidders."

The problem for solution, provided by these resolutions is, whether the latter award was legal and binding, so that a contract and sale of bonds thereunder will be legal. The argument advanced on behalf of the board of freeholders is to that effect; the proviso in the resolution of November 8th, 1916, attempts to make void the award and all proceedings touching the work therein referred to. The intention of the board could be reconsidered in the same way as any other intention of such board, according to parliamentary law and usage. The resolution of November 24th, even if not, strictly speaking, a reconsideration, is clearly a rescission of the previous action on the proviso, in the resolution of November 8th; the proviso, in the resolution of November 8th, constitutes a repealer of the proceedings anterior thereto; the resolution of November 24th constitutes a repeal of such repealer, which, therefore, in accordance with well established

law, revives such anterior proceedings. The fact is the board of chosen freeholders passed upon the question of the lowest bidder and of the formality of the bid and awarded the contract to Messrs. Liddle & Pfeiffer, subjecting it, however, to a condition not contemplated by the bidder and not embodied in the advertisement for bids and which the board of chosen freeholders could not enforce against the bidder without his consent. The award must follow the terms of the advertisement. *Armitage v. Mayor, &c., of Newark*, 86 N. J. L. 5. The action of the board on November 8th was neither an award of the contract, in accordance with the terms of the advertisement nor was it a rejection of all bids by the board. On the 24th of November, the board again met in special session and then took the action which was their duty to take, by determining to award the contract to Messrs. Liddle & Pfeiffer and not to reject their bid. Meanwhile, the bid of Messrs. Liddle & Pfeiffer had not been withdrawn, but was a continuing one and subject to acceptance by the board; as the action of the board of freeholders on November 8th is susceptible of the view that a valid award was then made under the resolution, for the reason that the board was without power to impose a condition not contained in the notice to bidders or the plans and specifications, and inasmuch as it undertook to make an award, that part of the resolution containing the unauthorized proviso was void and of no effect. In either event a valid award was made to Messrs. Liddle & Pfeiffer on the 8th or 24th of November, 1916.

This argument is more ingenious than sound.

The prosecutors, in reply thereto, argue that it shall be lawful for the board of chosen freeholders to award a contract or contracts for such repairs or reconstruction on bids duly advertised for in two public newspapers, printed and circulating in such county, for two weeks successively, at least, once in each week, before the date fixed therein for the receipt of the bids. *Pamph. L. 1914, p. 204, § 1.* So, in the act of 1912, *p. 837, § 22.* The state commissioner shall advertise for bids which shall state the hour, date and place where the sealed proposals will be received and publicly opened and read.

The commissioner may then reject any or all bids, but the award of the contract, if made, must be to the lowest responsible bidder.

The board reserved the right in this case in the advertisement to reject all bids. The universal practice is to reject all bids, adjourn to a fixed day for further consideration, or award a contract. They chose the latter course. They awarded the contract upon condition that the Egan bill had not been adopted by the voters of the state. But the voters of the state had adopted the act. Possibly two views are permissible, one, that the award never had any legal vitality because of the condition imposed, the other, that having had vitality it was lost when the fact appeared that the Egan act had been adopted. Either view defeats the award.

It is not controverted that an adjournment may be taken for consideration at a later day, but if there be action or non-action and no new day is left open for a further consideration, then the transaction is final and concluded. To use the words of the brief: "The award of November 8th was something or nothing. If something, it was final—if nothing, it could not be revived by the action on November 24th."

While I am not aware of any statute or decision that either permits or forbids these public contracts to be awarded upon conditions, *i. e.*, depending upon the happening or not happening of events not connected with the subject-matter of the contract, on grounds of sound public policy, contracts so awarded should be declared void. If the award can be made to depend upon one condition, why not on two or many? If this condition in the award can be nullified after sixteen days at a special meeting, not an adjourned meeting, why not after thirty, forty or sixty days, and so on, until the award of the contract will be left in confusion and uncertainty, the legality of the bonds issued to pay for the cost impaired? This litigation is an apt illustration of the uncertainty that does arise out of awarding a public contract upon a condition.

The course demanded by all interests affected in the awarding of these public contracts at the time fixed in the adver-

tisement for receiving and reading the bids, is either to award a contract, reject all the bids or adjourn to some fixed time publicly announced for further consideration. Any other course is open to suspicion and uncertainty. If conditions are to be attached to the making of an award, such conditions should be stated in the advertisements calling for bids, so that the award of a contract under such an advertisement would follow its terms. *Armitage v. Mayor, &c., of Newark, supra*. Section 33 of the Crimes act (*Comp. Stat., p. 1756*) requires that bids shall be opened in public, at the time and place on the day named in the advertisement, and public announcement made of the contents in the presence of the parties bidding or their agents. By statute (*Pamph. L. 1913, p. 366*), in contracts to be paid by state funds exceeding the sum of \$1,000, the contract therefor shall be awarded within three days after the day prescribed for publicly opening the bids.

I am therefore constrained to hold that the award of the contract in this case is void. This makes it unnecessary to consider or decide the other important and interesting points raised by the prosecutors, which were argued orally and at length in the briefs of the respective counsel representing all parties to this litigation.

The resolution awarding the contract to Messrs. Liddle & Pfeiffer is set aside, with costs.

POST MORTGAGE AND LAND COMPANY v. JOSEPH FRANK
DAVIS.

Submitted June 6, 1916—Decided November 8, 1916.

1. In this case, which is an action of ejectment, in which both parties to the suit relied upon a paper title, the testimony and exhibits being examined—*Held*, the verdict of the jury in favor of the defendant was not against the weight of the evidence.

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2. A paper-writing, which recites that "in consideration of a better business feeling and to avoid future litigation between us do quit-claim," &c., endorsed "Quit-claim and settlement of lines," has none of the elements of a deed. It was not error to admit such a paper-writing in evidence on the ground that it was not recorded in accordance with the Conveyances act. *Comp. Stat.*, p. 1553, § 54.
3. It was not error to admit in evidence a copy of a referee's report and rule for judgment in the Supreme Court, endorsed by the clerk, as a true copy, certified under the hand of the clerk and seal of the court, April 8th, 1806.
4. In this case it was not error to admit in evidence a non-recorded deed. The fact that a deed was not recorded does not destroy its evidential value. A non-recorded deed is only void as against parties claiming under another conveyance from the same grantor, who took without notice of the unrecorded instrument. *Comp. Stat.*, p. 1553, § 54.

On rule to show cause.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the plaintiff, *Arthur S. Corbin* and *E. Max Applegate*.

For the defendant, *Albert C. Abbott* and *Ulysses G. Styron*.

The opinion of the court was delivered by

BLACK, J. This was an action of ejectment brought to recover possession of a tract of land of about five hundred acres, included in a large tract of about sixteen thousand acres, in the townships of Hamilton and Weymouth in Atlantic county.

The case was tried at the Atlantic Circuit, resulting in a verdict in favor of the defendant. A rule to show cause was granted by the trial judge. The plaintiff specifies six grounds upon which it relies for a new trial. First and second, that the verdict is against the evidence and the weight of the evidence. Each of the parties claims to hold the legal paper title. The controversy relates exclusively to the paper title and not to any title derived by adverse possession.

The plaintiff claims to trace its title back to the council of the West Jersey Proprietors. Numerous documents, deeds

and wills, maps and other papers, have been introduced on the side of the plaintiff to show its title. Also the testimony of a witness, Ralph L. Goff, a surveyor, that the *locus in quo* is embraced within the documents offered by the plaintiff; on the other hand, the defendant contends that the plaintiff has failed to show the true legal title for the *locus in quo*, and that he, the defendant, has the true legal title. The defendant also claims to be the owner by a title, coming from the same source as that of the plaintiff. An action of ejectment was brought by Charles Shoemaker and his associates, in the Supreme Court, in 1805, against one John Ford, involving some at least of the *locus in quo*. The same year, a survey was made of the land by Matthew Collins, deputy surveyor general of this state, which was put in evidence. Two witnesses, John T. Ashmead and Raymond P. Thompson, surveyors, testified that the *locus in quo* is the same as that shown by the Matthew Collins map of 1805. The trial, which was had before referees, resulted in favor of Ford. The defendant's title comes from Ford; the plaintiff's title comes down through the Shoemaker's ownership. After a close examination of the various exhibits, we are inclined to think that the finding of the jury in favor of the defendant was right. In a conflict of testimony, where the facts found by the jury will sustain the verdict, the court should not set it aside, even though the jury might upon the evidence have found otherwise. *Knickerbocker Ice Co. v. Anderson*, 31 N. J. L. 333, 335; *Faux v. Willett*, 69 Id. 52; *Garrett v. Driver Harris Wire Co.*, 70 Id. 382.

The next insistence is that the trial court erred in admitting in evidence a paper-writing, offered by the defendant, which was executed by John Ford and Samuel Richards in 1816. This Samuel Richards stood in the same right that Charles Shoemaker and his associates did. The paper-writing recites, that "in consideration of a better business feeling and to avoid future litigation between us, do quit-claim, establish and agree with each other forever," &c. This paper seems to be an agreement, between the parties, fixing the boundary line between their respective properties. It is endorsed a

"quit-claim and settlement of lines." It has none of the elements of a deed. It does not purport to convey anything; it contains no words of grant; it effected no change in possession, but merely established the property line. The contention, therefore, that it ought not to have been admitted in evidence because it was not recorded, is answered, as the statute appealed to, the Conveyances act (*Comp. Stat.*, p. 1553, § 54), only applies to non-recorded deeds. This paper is in all essentials unlike the Iliff-Denny deeds, considered by Vice Chancellor Leaming in the case of *McGrath v. Norcross*, 78 N. J. Eq. 120, 128.

There is no merit in the next point, viz., the court erred in allowing counsel for the defendant to read this exhibit to the jury. If the exhibit was competent evidence, it was of course proper to permit it to be read to the jury. It is next contended that it was error to permit the defendant to put in evidence what purported to be a copy of the referee's report and rule for judgment, endorsed by the clerk of this court as a true copy, in the Shoemaker-Ford ejectment suit, on the ground that the original should have been produced or its loss proved. This copy was a certified copy of the report, under the hand of the clerk and the seal of the court. This certification of the copy was made on April 8th, 1806. It was properly admitted as a certified copy of the record or of a part of the record. Moreover, the case shows that the report itself had disappeared from the files of the clerk's office. It is further claimed, which is the last insistence, that it was error for the trial court to admit in evidence a non-recorded deed, made by one James Davis to John Ford, dated September 25th, 1813. The fact that the deed was not recorded did not destroy its evidential value. The non-recorded deed is only void as against parties claiming under another conveyance from the same grantor, and who took without notice of the unrecorded instrument. *Comp. Stat.*, p. 1553, § 54. In the present case the plaintiff does not claim any interest under the Ford title. The defendant was entitled to prove the unrecorded deed, to trace his own right, through John Ford. The land in the Davis deed had originally be-

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longed to Ford. Ford and wife, on December 13th, 1804, conveyed it to Davis by a deed, which is on record, and Davis some years afterward reconveyed.

The rule to show cause is discharged.

WILLIAM PYERS, PLAINTIFF-RESPONDENT, v. FANNIE L. TIERS, DEFENDANT-APPELLANT.

Submitted June 6, 1916—Decided November 8, 1916.

Backing an automobile out into a street, without warning to other users of the street, including the plaintiff, who was injured while riding a motorcycle by coming into collision with another automobile in an attempt to avoid the automobile backing. The defendant's negligence and the plaintiff's contributory negligence are questions of fact to be decided by a jury. It was not error for the trial court to refuse a motion to nonsuit the plaintiff or direct a verdict for the defendant.

On appeal from the Morris County Circuit Court.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the plaintiff-respondent, *Elmer W. Romine*.

For the defendant-appellant, *Kalisch & Kalisch*.

The opinion of the court was delivered by

BLACK, J. The plaintiff, William Pyers, sued the defendant, Fannie L. Tiers, for injuries received under the following circumstances: The plaintiff was riding a motorcycle along South street, in the city of Morristown, going toward Madison, on June 25th, 1915. In front of him, traveling in the same direction, was an automobile driven by Frederick B. Richardson. The plaintiff passed this automobile, going to

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the left, as the law required. Just as he was passing it, or just after he had passed it, the defendant's car, which was standing alongside the right-hand curb, backed out into the middle of the street. It was about ten or twelve feet away when he first saw it. The plaintiff attempted to go around behind it, which brought him within three or four feet of his left curb line. As he was doing this, the way was obstructed by a wagon on his left hand, coming toward him, and also by another automobile on his right, operated by Dr. Glazebrook. The plaintiff undertook to pass between these two vehicles, which were parallel with one another, but was unsuccessful and collided with the Glazebrook machine. He was thrown from his motorcycle, receiving the injuries for which he sues. The question was whether the defendant, Mrs. Tiers, was responsible, and is raised by the refusal of a motion to nonsuit and to direct a verdict, the jury having found a verdict in favor of the plaintiff.

There was proof that the defendant's automobile was backed out into the street, without warning to other users of the street, the plaintiff included. The Motor Vehicles act—*Pamph. L. 1915, pp. 285, 294, § 11 (4)*—provides: "No vehicle shall back or make a turn in any street if by so doing it interferes with other vehicles, but shall go around a block or to a street sufficiently wide to turn in without backing." See, in this connection, *Evers v. Davis*, 86 N. J. L. 196. It was therefore a question for the jury to say whether this act was not negligent, jeopardizing, as it did, other users of the highway, who happened to be in close proximity. It is suggested, but not argued, that even if the defendant's action was a contributing cause, originally, it was not the proximate cause; that the presence of the Glazebrook car was an intervening cause, which relieved the defendant from responsibility. But an intervening cause, in order to relieve from liability, must itself be a wrongful cause—that is, a cause for which the producer thereof would himself be liable to the plaintiff. Mr. Justice Depue, speaking for the Court of Errors and Appeals, in the case of *Delaware, &c., Railroad Co. v. Salmon*, 39 Id.

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299, 309, cites with approval the rule in these words: "That a person whose negligence may have been one of the antecedents or conditions of an event is relieved juridically from liability if such negligence is applied to the particular event by the intervening negligence or malice of a third party." *Kuhn v. Jewett*, 32 N. J. Eq. 647; *Cuff v. Newark, &c., Railroad Co.*, 35 N. J. L. 17; 1 *Thomp. Negl.* (2d ed.), § 49. In the present case, it was not suggested that Dr. Glazebrook was at all in fault.

As to the question of the contributory negligence of the plaintiff, that was also for the jury to determine. He was put in a position of danger without any carelessness on his own part. He might perhaps have avoided the accident by stopping his machine, and perhaps would have done so had he observed the situation in time to safely come to a stop. But, as was said by the Court of Errors and Appeals in *Connelly v. Trenton Passenger Railway Co.*, 56 N. J. L. 700, 704: "How a prudent man would act in the face of concurrent and distracting dangers must, in the nature of things, be a question of fact to be passed upon by the jury, and not a question of law upon which a court may order a nonsuit or direct a verdict."

The judgment under review is affirmed.

THE STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
ANDREW TERRY, PLAINTIFF IN ERROR.

Argued June 7, 1916—Decided November 8, 1916.

It is reversible error for the trial court, during the progress of a trial, on an indictment for keeping a disorderly house, to strike from the record parts of the testimony of a witness and to direct the jury to pay no attention to such testimony, on the ground that it is not worthy of belief, at the same time ordering the witness to be taken into custody by a constable in the presence of the jury.

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On error to the Atlantic County Quarter Sessions.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the plaintiff in error, *Isaac H. Nutter and Garrison & Voorhees*.

For the defendant in error, *Charles S. Moore and Wm. Elmer Brown, Jr.*

The opinion of the court was delivered by

BLACK, J. Andrew Terry was convicted in the Atlantic Quarter Sessions, January term, 1916, on two separate indictments, charging a violation of the sixty-fifth section of the Crimes act, for keeping a disorderly house. They were gambling houses at Nos. 204 North Chalfonte avenue and 1139 Baltic avenue in the city of Atlantic City. The two indictments were tried together. Separate judgments were entered under the convictions. Writs of error were taken in each case. The cases were brought up under the one hundred and thirty-sixth section of the Criminal Procedure act. Errors were assigned in the bill of exceptions by the trial judge and causes for reversal were also assigned. The causes relied upon for reversal all relate to the rulings of and statements by the trial court, in relation to Raymond Jefferson, a state's witness. The record shows this colloquy:

"Mr. Garrison—I object to the reading of that record.

"The Court—Bring that record up here. I think this witness ought to be taken into custody on the charge of perjury.

"Mr. Garrison—If your honor please, we ask for an exception to that remark and ask to have it spread upon the record.

"Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

"The Court—An officer will take charge of this defendant."

* * * * *

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"The Court—Take this witness into custody and strike his answers from the record, and the jury will pay no attention to what he has testified to. Whatever belongings he has, let him go back and get them.

"(Constable Baker takes the witness into custody.)

"Mr. Garrison—To have the record straight, we believe that a juror ought to be withdrawn at this time. We think it is a mistrial.

"The Court—The juror will not be withdrawn.

"Mr. Garrison—That motion is denied, then?

"The Court—Yes.

"Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

"The Prosecutor—All that testimony stricken from the record?

"The Court—All of that testimony is stricken from the record and the jury instructed not to pay any attention whatsoever."

* * * * *

"The Court—I know you don't desire any further testimony, but there was some cross-examination from you that I say will remain on the record.

"Mr. Nutter—But that is already on the record.

"The Court—Yes, that you will be given the benefit of."

This court held, in the case of *State v. Harrington*, 87 N. J. L. 713, 716; affirmed, *Id.* 716, the arrest of one of the state's witnesses in view of the jury, after he had left the stand, is no ground for reversing a judgment. In that case, it was said, his arrest may have been for some offence entirely disconnected with the trial of the case. But, even if the evidence showed that it was for perjury committed on the witness-stand, that would not vitiate the trial. That case was affirmed in the Court of Errors and Appeals (87 *Id.* 716), for the reasons stated in the Supreme Court. 12 Cyc. 542 (L). This case is distinguished from the *Harrington* case, for in addition to the arrest of the witness in the presence of the jury, a practice not to be commended, the court ordered part, at least, of the testimony of the wit-

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ness to be stricken from the record, and directed the jury to pay no attention to what the witness had testified to. This clearly was error injurious to the defendant. While it is true that it is the accepted rule of law in this state that it is the right and duty of a trial judge to comment upon the evidence, in the charge to the jury (*State v. Lovell*, 88 N. J. L. 353; *State v. Hummer*, 73 N. J. L. 714), yet, when he attempts to take from the jury evidence, on the ground that it is unworthy of belief, and emphasizes that ruling by having the witness arrested and taken into custody in the presence of the jury, such action of the trial court is an improper assumption of, and an infringement upon, the province of the jury. The court stepped outside of its judicial functions.

For this error the judgments under review will be reversed.

THOMAS WARD, PLAINTIFF-RESPONDENT, v. ERIE RAIL-
ROAD COMPANY, DEFENDANT-APPELLANT.

Submitted June 6, 1916—Decided November 8, 1916.

1. Where the act of a servant is a willful one, not expressly or impliedly within the line of the servant's duty or employment, entirely disconnected therefrom, done, not as a means, or for the purpose of performing the master's work, the master is not responsible for such act of the servant.
2. The above rule applied in this case, where it appears the defendant's watchman or detective shot the plaintiff as he approached the watchman on defendant's property, without any notice or reason for such shooting. *Held*, it was error not to grant a motion to nonsuit or direct a verdict in favor of the defendant, the master.

On appeal from the Hudson County Circuit Court.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

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For the plaintiff-respondent, *Weller & Lichtenstein*.

For the defendant-appellant, *Collins & Corbin*.

The opinion of the court was delivered by

BLACK, J. The plaintiff, Thomas Ward, sued Matthew Cannon and the Erie Railroad Company to recover damages for personal injuries done to him, resulting from an assault and battery, by a gunshot in the groin, on Saturday afternoon, August 15th, 1914, about four-thirty. The trial resulted in a verdict against both defendants. The Erie Railroad Company only appeals. The only errors alleged are the refusals of the trial judge to grant the motions to nonsuit and to direct a verdict in favor of the defendant; upon the refusal of the trial judge to nonsuit, the defendant rested without offering further testimony and moved for a direction of a verdict, on the same grounds urged on the motion for a nonsuit.

The only point involved in the case is whether Cannon, when he fired the shot at the plaintiff, was acting within the scope of his employment, as a detective, servant or agent of the defendant company? Our examination of the record leads us to the conclusion that he was not such servant or agent; that it was error for the trial court not to have granted the motions to nonsuit the plaintiff and to direct a verdict in favor of the defendant. The plaintiff's version of the occurrence, in substance, is as follows: That, on the afternoon of the day of the shooting, the plaintiff was standing under the Park avenue viaduct, or bridge, that crosses the Erie railroad, in Hoboken, near Willow avenue, which is about two hundred and twenty feet or more from the place where the shooting occurred. The shooting occurred on the property of the Erie Railroad Company. This was the beginning of the Erie railroad freight yard at Weehawken. The plaintiff heard several shots and ran over to the railroad track and saw there the defendant Cannon standing over a man by the name of Ferris, whom the plaintiff knew, and when he, Ward, the plaintiff, got within three or four feet of Cannon, Cannon fired a shot

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at plaintiff. Nothing was said before the shot was fired, and nothing was said after the shooting. The plaintiff then went home. Ward did not know Cannon, or that he was working for the Erie Railroad Company. When he first saw Cannon he was standing over Ferris and had a gun in his hand. Ferris was lying on the ground; neither Cannon nor Ferris was doing anything, the one was standing and the other lying on the ground; the plaintiff saw this, when he was from two hundred to fifty feet away, he states both distances. He continued to walk toward Cannon and Ferris. He was facing them and going straight toward them. He could see everything. He was on the railroad property. No train obstructed his view. There is no contention that Cannon was not an employe of the Erie Railroad Company; just previous to the shooting, Cannon and Glaser, another railroad watchman, had driven Ferris and one Reilly off a loaded coal train. None of the plaintiff's witnesses testified that they saw Cannon fire the shot; on the contrary, they said they did not. The plaintiff is therefore limited to his own version of how the affair happened. The plaintiff's insistence is that whether the shooting by Cannon was within the scope of his employment was a question of fact for the jury, citing in the brief in support of that position the following cases: *Carey v. Hamburg American Packet Co.*, 72 N. J. L. 56; *Bernadsky v. Erie Railroad Co.*, 76 *Id.* 580; *Dierkes v. Haushurst Company*, 80 *Id.* 369; *Magar v. Hammond*, 183 N. Y. 387. In the case of *Carey v. Hamburg American Packet Co.*, *supra*, this court held there was sufficient evidence to justify a jury in finding that the men who assaulted the plaintiff were in the defendant's employ, and that when the assault was committed, they were acting within the scope of their employment. So, in the case of *Bernadsky v. Erie Railroad Co.*, *supra*, the court held that the jury could properly find, from the testimony of the plaintiff and of the defendant Burns, that the plaintiff was a trespasser in the yards of the defendant company, at Weehawken; that Burns, in the discharge of his duty as watchman, undertook to drive the plaintiff off; that in doing so, he committed the assault sued for, and that

this abuse of the plaintiff was unnecessary and excessive. So, the Court of Errors and Appeals, in the case of *Dierkes v. Hauxhurst Land Co.*, *supra*, held, in cases where the scope of authority of a servant or agent depends upon disputed matters of fact, the extent of such authority is ordinarily a question for the jury. So, in the case cited from the New York Court of Appeals, *Magar v. Hammond*, *supra*.

There is no dispute, however, about the facts in the case under consideration. They all come from the plaintiff himself, and for the purposes of the motions for nonsuit, the direction of a verdict, and on this appeal the plaintiff's testimony must be taken, not only as true, but with every fair and legitimate inference that can be drawn from the facts as testified by the plaintiff.

But we think this case is controlled by the case of *Holler v. Ross*, 68 N. J. L. 324, in the Court of Errors and Appeals, which is an illustrative case, and one of many in the books. That case holds where it appears when the plaintiff rests that the act of the servant was a willful one, and was not expressly or impliedly within the line of the servant's duty or employment, there should be a nonsuit. That case was cited, subsequently, with approval by the same court, in the case of *Evers v. Krouse*, 70 *Id.* 653, holding that an act done by a servant while engaged in the work of his master, but entirely disconnected therefrom, done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent, malicious or mischievous purpose of the servant, is not in any sense the act of the master. The rule will be found stated, in nearly the same language, with a collection of many cases in 26 *Cyc.* 1528. See, also, *Tier v. Miller*, 80 N. J. L. 691.

This case is differentiated from the class of cases cited by the plaintiff, which hold that the master is liable for a willful injury inflicted on a trespasser where authority is given by a master to his servant to eject trespassers from the premises of the former, such as *Letts v. Hoboken Railroad Co.*, 70 N. J. L. 358; *Bernadsky v. Erie Railroad Co.*, *supra*; *New Ellerslie Fishing Co. v. Stewart*, 123 Ky. 8; 9 L. R. A.

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(N. S.) 475. That class of cases is based somewhat upon the idea that the law under the circumstances will not undertake to say when in the course of the assault the servant ceased to act upon his own responsibility. But those cases have no application to the facts of this case, for in this case there was no attempt made to eject the plaintiff from the company's property. The doctrine of those cases only applies when a person is attempting to eject a trespasser and uses more force than is necessary. The most favorable view that can be taken of the plaintiff's case is that Cannon is guilty of an assault and battery on Ward, the plaintiff; that an employe of the defendant company, while on its property, but doing nothing in its interest, either by authorization or implication, shot the plaintiff. The motion to nonsuit the plaintiff and direct a verdict for the defendant company should have been granted by the trial court. It was reversible error to deny these motions. Hence, the judgment against the Erie Railroad Company is therefore reversed, to the end that a *venire de novo* may issue.

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CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY

JUNE TERM, 1916.

DANIEL C. H. BROST, BY HIS NEXT FRIEND, CHARLES
BROST, APPELLANT, v. WHITALL-TATUM COMPANY,
RESPONDENT.

Submitted July 10, 1916—Decided November 20, 1916.

1. Compensation for injuries to an employe is recoverable under the provisions of the Workmen's Compensation act (*Pamph. L.* 1911, p. 134) if the contract of hiring be made after that act went into effect, unless there was, as a part of the contract, an express statement in writing prior to the accident, either in the contract itself or by written notice from either party to the other, that the provisions of section 2 of the act were not intended to apply; which notice, in case of a minor, is required to be given by or to his parent or guardian.
2. Where a minor employe received his pay in an envelope, upon which were printed words warning him that the provisions of the act were not intended by the employer to apply to its contract of hiring with him, and the boy gave his wages to his father in such envelope, who (the father) after receiving it and with such notice in his mind permitted the boy to go to work afterward, the provision in the act as to notice that it was not intended to apply was satisfied. *Troth v. Milleville Bottle Works*, 86 N. J. L. 558; *S. C.*, ante p. 219, distinguished.

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3. Where a statute provides for the giving of a notice but does not prescribe the manner of its service, it is sufficient if actual notice to the person to be affected is conveyed to him.
4. The provision in section 1 of the Workmen's Compensation act (*Pamph. L. 1911, p. 134*), that an injured employe's right to compensation shall not be defeated upon the ground that he assumed the risks inherent in, or incidental to, or arising out of, his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances (which ground of defence is, by the act, abolished), is constitutional.

On appeal from the Supreme Court.

For the appellant, *Wescott & Weaver*.

For the respondent, *Walter H. Bacon*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. The plaintiff, a minor aged nineteen years, brought suit by his next friend, who is his father, against the defendant corporation for physical injuries resulting to him while working as an assistant to glassblowers in the defendant's factory. The gravamen of the action was that the defendant at its factory maintained a mold hole over which boards were placed, and that in carrying materials from one part of the plant to another, it was necessary for the plaintiff to cross over it; that the defendant failed to keep the boards over the mold hole in a reasonably safe condition, and that as plaintiff was in the act of walking over the boards, without fault on his part, he slipped and fell into the mold hole because the boards were inadequate, unsafe and unguarded, and sustained injury. The suit was not one under the Workmen's Compensation act, but one at common law.

When the plaintiff rested, counsel for the defendant moved to nonsuit (1) because plaintiff's claim to compensation was governed by the Workmen's Compensation act under which he did not sue, and, if denied on that ground, then (2) because no negligence on the part of the defendant had been

shown, and (3) because the risk was an obvious one and was assumed by the plaintiff. The trial judge sustained the motion on the first ground, and, consequently, he did not consider or decide the other grounds. We think he erred.

The contract of hiring was made after the Workmen's Compensation act (*Pamph. L. 1911, p. 134*) went into effect, and, therefore, compensation would be recoverable under it, unless there was, as part of the contract, an express statement in writing prior to the accident, either in the contract itself or by written notice from either party to the other, that the provisions of section 2 of the act were not intended to apply. The plaintiff being a minor, the notice would have to be given by or to his parent or guardian (father in this case) (*Pamph. L. 1911, pp. 136, 137*), and the case on this phase turns upon the question of notice.

On the pay envelope delivered by the defendant to the plaintiff, there was printed these words:

"Employes take notice that provisions of section 2 of the Employers' Liability act, approved April 4th, 1911, chapter 95 of the law of 1911, are not intended by this corporation to apply to its contract of hiring with you."

The boy gave his wages to his father when he was home, and, when he was not, to his mother. His father testified that he received at least one of the pay envelopes with the printed notice on it, and with that notice in his mind let the boy go to work afterward.

Counsel for respondent argues that this case is within that of *Troth v. Millville Bottle Works*, 86 N. J. L. 558; *affirmed, ante p. 219*. In that case a notice precisely the same in effect, and almost identical in language, was posted in the defendant's works and also given to its employes through the medium of a pay envelope, and it was held in the Supreme Court that when section 2 of the act is not intended to apply to the employment of minors, a notice must be given by or to the parent or guardian of the minor, and that notice posted in the works and given by means of a pay envelope does not suffice. There was no holding to the effect that if the parent or guardian of the minor saw the posted notice or the notice

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on the pay envelope that it would not amount to legal notice, only that such notice was not in and of itself sufficient.

In the Troth case an order had been made by the judge of the Cumberland Pleas that the Millville Bottle Works pay Troth, a minor, a certain amount as compensation for injury received by him while at work for the company. In the Supreme Court it was contended, *inter alia*, that the employer had given notice to the employe of the fact that it would not be bound by section 2 of the Workmen's Compensation act; but it was not proved that the notice, posted in the works and given to the minor through the medium of the pay envelope, had come to the knowledge of the boy's father, and the Supreme Court sustained the order for compensation under the act. In the affirming opinion in the Troth case in this court, the question of notice was upheld on the reasoning upon which the Supreme Court based its conclusion.

Now, a marked difference between the want of notice in the Troth case, and the fact of notice in the case at bar, is apparent. In the Troth case, although notice was posted and also printed on the pay envelope, it never reached the parent of the minor. In the case at bar, the notice printed on the pay envelope reached the father of the minor, and he permitted his son to continue at work after the actual receipt of the notice, and with that very notice in his mind. The two cases are clearly distinguishable.

It is to be observed that the Workmen's Compensation act does not prescribe the *form* of notice to be given by or to the parent or guardian of a minor employe, to prevent the operation of the act upon the contract of hiring, nor of the manner of *service* of such notice. It appears, therefore, that actual notice is all that is necessary to bring the given contract within the purview of the statute.

In *Wilson v. Trenton*, 53 N. J. L. 645, this court had before it the question of service of a notice of an assessment for the laying out and opening of a street in Trenton, the charter of which city requires that notice be served upon residents. It is not perceived that a statute, requiring the giving of a notice of an assessment for the laying out and open-

ing of a street, differs in regard to the manner of service from one requiring notice that the Workmen's Compensation act is not to apply in a given case, the method of service not being provided for in either statute. In *Wilson v. Trenton*, Mr. Justice Magie (afterwards Chancellor), speaking for this court, observed (at p. 648) that "if the required notice is conveyed to the person to be affected thereby, it is sufficient." In the case at bar, as already shown, the notice was actually conveyed to and received by the boy's father.

We are of opinion that there was due service in this case of the notice that the Workmen's Compensation act should not apply, and, therefore, the plaintiff's suit was properly brought at common law. This conclusion makes it necessary for us to consider one of the other two reasons upon which the motion to nonsuit was rested, namely, (2) that no negligence on the part of the defendant was shown; and it would also make necessary consideration of the remaining reason, namely, (3) because the risk was an obvious one and was assumed by the plaintiff, if it were not for the provision of section 1, paragraph 2 of the Workmen's Compensation act, which abolishes the common law defence of assumption of risk in this class of cases. *Pamph. L. 1911*, p. 134.

Although the nonsuit in this case was grounded upon only one of the three reasons urged, nevertheless, if one or both of the other two reasons, which the trial judge ignored, were valid, the judgment would have to be sustained. And this because a judgment upon nonsuit will be affirmed if correct on any legal ground, although the reason assigned by the trial court be erroneous. *Gillespie v. W. J. Ferguson Co.*, 78 N. J. L. 470.

As to defendant's negligence: The plaintiff's suit is predicated upon the theory of defendant's negligence. Of course, if the defendant had not been in anywise negligent, the judgment of nonsuit would be right, although rested upon other ground. The condition of the covering of the mold hole, namely, the loose board with a hole in it, which had existed for a long time, and which made possible such an accident

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as that which happened to the plaintiff in the course of his employment, made the question of defendant's negligence one for the jury.

As to assumption of risk: The provision in section 1 of the act on this score is, that the right to compensation shall not be defeated upon the ground that the injured employe assumed the risks inherent in, and incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances, which ground of defence is, by the act, abolished. This enactment is constitutional according to our decisions.

In *Sexton v. Newark District Tel. Co.*, 84 N. J. L. 85, there was reviewed on *certiorari* in the Supreme Court a judgment of the Essex Pleas in an action under the Workmen's Compensation act, called in that case "the Employers' Liability act," and one of the questions was as to whether section 2, prescribing compensation for injuries, applied. It was held that it did, and the judgment was affirmed. Mr. Justice Trenchard, speaking for the Supreme Court, observed (at p. 92) that it was necessary to consider the objections raised as they might be applicable to either section (1 or 2) of the act. Among the objections and reasons for reversal were that the act violated the "due process of law" and "equal protection of the laws" provisions of the federal constitution, and that it impaired the obligation of contracts in violation of the state and federal constitutions; and it was held (at p. 94) that as against the objections raised, section 1 of the act was clearly a valid and constitutional enactment. This case was affirmed in this court (*Ibid.*, 86 *Id.* 701) but the question of the constitutionality of the abolition of the assumption of risks doctrine was not passed upon in the opinion.

In *Waibel v. West Jersey and Seashore Railroad Co.*, 87 N. J. L. 573; this court had before it the question whether chapter 278 (*Pamph. L.* 1910, p. 490), modifying the defence of contributory negligence in actions to recover damages for injuries or death occurring at railroad crossings, in certain circumstances, was valid. The constitutional ob-

jection urged was that the statute violates the provision guaranteeing the right of trial by jury, and, while Mr. Justice Trenchard, who wrote the opinion, observed (at p. 576) that it was not perceived how or in what manner the act violated that provision, he went on to say (at p. 577) that what the act did was to require the trial judge to submit the question of contributory negligence to the jury; that it was true that theretofore in that class of cases, whenever the proof clearly showed contributory negligence, the trial judge was required to nonsuit the plaintiff, but that even regarding it as a rule of the common law, the right to a nonsuit, upon the ground of contributory negligence, was not entrenched behind any constitutional provision and was not originally created by legislative action; that it was a rule established by the courts, and that we have held, in effect, that common law defences may be modified or even abolished by the legislative power, where the cause of action arose after the legislative provision became effective, citing *Seaton v. Newark District Tel. Co.*, *supra*, and *Second Employers' Liability Cases*, 223 U. S. 1, wherein the Supreme Court of the United States held that a person has no property or vested interest in any rule of common law, and that while rights of property which have been created by the common law cannot be taken away without due process, yet the law itself as a rule of conduct may be changed at the will of the legislature, unless prevented by constitutional limitations. It was also observed in the opinion in the Waibel case (at p. 577) that our Supreme Court in *Quigley v. Lehigh Valley Railway Co.*, 80 N. J. L. 486, had sustained the constitutionality of the Employers' Liability act of 1909 (*Pamph. L.*, p. 114) which regulated the common law defence of employers, and that this court in *Brown v. Erie Railway Co.*, 87 *Id.* 487, sustained and applied chapter 35 (*Pamph. L.* 1909, p. 54) and chapter 96 (*Pamph. L.* 1909, p. 137), both somewhat similar in purpose and effect to the statute then under consideration in the Waibel case, although no suggestion was made in the Brown case that these enactments were beyond the power of the legislature.

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A decision in a sister state directly in point on the question now under consideration is that *In re Opinion of Justices* (Mass.), 96 N. E. Rep. 308—approvingly quoted from in the Waibel case (at p. 578)—in which, as far as applicable to the case at bar, it was held that the rule relating to assumption of risk having been established by the courts and not by the constitution, the legislature may change or repeal it as a defence. As already observed, it was expressly held in the Waibel case (at p. 578), that the rule abolishing the court's power to nonsuit a plaintiff in an action to recover for injuries or death of a traveler at an unguarded highway grade crossing, having been established by the courts, the legislature might change it by providing that the plaintiff should not be nonsuited on that ground, but that that question should be left to the jury to determine.

We cannot perceive any difference in principle between the modification of the defence of contributory negligence under chapter 278 (*Pamph. L.* 1910, p. 490) sustained as constitutional by this court in the Waibel case, and the abolition of the defence of assumption of risks contained in the statute under consideration in the case at bar. In our opinion, assumption of risks by an employe is no longer available as a defence to employers when the given accident happened after the Workmen's Compensation act of 1911 took effect, and as the injury to the plaintiff in this case was received subsequent to that time, he could not lawfully have been nonsuited upon the theory that he was injured through an obvious risk which he assumed.

The views above expressed lead to a reversal of the judgment of the court below, and an award of a *venire de novo*.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 14.

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Koewing v. West Orange.

JESSIE KOEWING, PLAINTIFF-APPELLANT, v. TOWN OF WEST ORANGE, DEFENDANT-RESPONDENT.

Argued June 29, 1916—Decided November 20, 1916.

1. A motion to strike out a complaint under the Practice act of 1912, for want of showing cause for action, is the equivalent of a demurrer in the former practice, and only admits facts well pleaded, and not conclusions of law arising from the facts stated.
2. Duress, for which a person may void a contract or recover back money paid under its influence, exists where one by an unlawful act of the beneficiary or his authorized agent, or by the act of some person with his knowledge, is constrained under circumstances which deprive him of the exercise of free will to agree to, or to perform, the act sought to be avoided.
3. The collection of taxes through threats by the authorities of a municipality to which they are owing, that unless the sum due is paid the owner's right to redeem will be barred or foreclosed, does not amount to unlawful coercion and is not duress.
4. Payment is not rendered involuntary merely because the payer at the time makes a protest against the payment, and if money is paid under compulsion no protest is necessary to lay the foundation of an action to recover it; but, if there be doubt as to whether the payment was voluntary, the protest may be taken into account in determining that question.
5. A voluntary payment cannot be recovered by the payer.

On appeal from the Supreme Court.

For the plaintiff-appellant, *Edwin T. Murdock*.

For the defendant-respondent, *Simeon H. Rollinson* and *Borden D. Whiting*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. Action was brought in the Supreme Court by Mrs. Koewing against the town of West Orange to recover the sum of \$1,455.92, collected by the town from her for taxes, and which collection she avers was made upon wrongful and unlawful duress and compulsion. The complaint, on motion, was struck out.

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A motion to strike out a complaint under the Practice act (1912), for want of showing cause for action, is the equivalent of a demurrer in the former practice. A demurrer only admitted facts well pleaded, and not conclusions of law arising from the facts stated. *Tinsman v. Bel. Del. Railroad Co.*, 26 N. J. L. 148. See, also, *Coxe v. Gulick*, 10 Id. 328; *Davis v. Minch*, 80 Id. 214.

Among the six reasons upon which the motion to strike out was grounded, one was that the complaint showed the taxes to have been paid voluntarily and did not show compulsion. If this contention be sound it is alone sufficient to sustain the order appealed from. That order recites that the complaint does not disclose any cause of action.

The complaint contains five counts. They are very voluminous, the first one being divided into thirty-three paragraphs; the second into seven; the third into ten; the fourth into five, and the fifth into five.

The complaint shows that the taxing authorities of the town having increased the assessed valuation of Mrs. Koewing's property, she appealed to the county and state boards and the valuation was reduced. Still being dissatisfied she prepared to appeal from the reduced valuation, but in treaty with the town it was agreed that she should let the valuation stand and pay \$4,657.60, the face amount of the taxes due, and the town would waive the interest and costs thereon, amounting to \$678. She paid the \$4,657.60, which the town accepted and used. The collector, however, disobeying instructions from the town authorities, credited the amount on taxes and costs for part of 1905 and for 1906, 1907 and 1908. This left an apparent balance of taxes for 1905 of \$678, which would carry interest at twelve per cent. In 1915, the town notified Mrs. Koewing to exercise her right to redeem her property from the lien of the balance within sixty days, or on failure thereof, she would be forever barred and the premises would become the town's property by operation of law. The sum demanded was \$1,455.92, which was the tax balance of \$678, with interest added.

To avoid loss in the event of unsuccessful litigation, Mrs.

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Koewing alleges that she paid the above mentioned sum of \$1,455.92 "under duress and compulsion," protesting that she owed nothing, and sued to recover the amount so paid. It was the complaint in the suit for its recovery that was struck out by the Supreme Court on the ground that it did not show cause for action, and from that order she has appealed to this court.

The facts above recited are from the first count in the complaint. The second and third ones recite different proceedings looking to an adjustment of the matters in controversy between the parties, and the fourth and fifth ones advance different theories upon which the plaintiff claimed recovery upon the facts stated. The last four counts claim different sums as damages, according to the theory of the various counts. It is not deemed necessary to epitomize them here.

The gravamen of the whole complaint is, that the payment of the \$1,455.92 was not voluntary, but was the result of duress and compulsion. The only question necessary to be decided is as to whether or not payment by the plaintiff was procured by the defendant "under duress and compulsion," as the plaintiff herself puts it, for if the payment were voluntary and not the result of unlawful compulsion, the complaint was properly dismissed.

A very good definition of duress is that adopted in the opinion of the court *In re Myers*, 106 *Fed. Rep.* 828, 831, as follows:

"The duress for which a person may avoid any contract or conveyance made, or recover back any money paid under its influence, exists where one by an unlawful act of the beneficiary or his authorized agent, or by the act of some person with his knowledge, is constrained under circumstances which deprive him of the exercise of free will, to agree or to perform the act sought to be avoided."

The averments of the complaint, singly or together, do not show a case of duress within this definition. The parties to the suit at bar dealt at arm's length.

In *Camden v. Green*, 54 N. J. L. 591, it was held to be a general principle that if a person without mistake of fact or

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in the absence of fraud, duress or coercion, pays money on a demand which is not enforceable against him, the payment is deemed a voluntary one and cannot be recalled. Thus it appears that if the tax lien could not have been enforced against the property of the appellant, and there was no mistake of fact, and no fraud, duress or coercion practiced upon her, she could not recover the money paid. The complaint under review does not plead any fact showing mistake, fraud or duress, or that the tax lien was not enforceable against the plaintiff, and, therefore, she is not entitled to recover. And the fact that she paid under protest does not aid her. *Shoemaker & Co. v. Board of Health*, 83 *Id.* 425.

In *Mee v. Montclair*, 84 N. J. L. 400, a policeman was fined for delinquency and was told by the chief of police to endorse his salary check to the town in payment of the fine. This he did, but as it did not appear that the fine was an illegal one, or that the chief used any coercion to compel the endorsement, or that the policeman had made a protest, it was held that the payment was voluntary and could not be recovered. It is not to be understood that if the policeman had protested that that would have compelled a different decision in his case. The fact that he did not protest appeared in the evidence and must be considered as having been adverted to in the opinion of the court as tending, among other facts, to show that there was no compulsion. In 30 *Cyc.* 1310, it is stated that a payment is not rendered involuntary merely because the payer at the time makes a protest against the payment, and that if money is paid under compulsion, no protest is necessary to lay the foundation of an action to recover it, but if there be doubt as to whether the payment was voluntary, the protest may be taken into account in determining that question. This is clearly the law.

Mrs. Koewing avers that she was coerced into making the payment she seeks to recover, through threats by the town authorities that unless she paid the sum demanded her right to redeem would be forever barred, that is, foreclosed. It has been held that the collection of money secured by mortgage through threats of foreclosure does not amount to duress.

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See *Shuck v. Association*, 63 S. C. 134; *Vick v. Shinn*, 49 Ark. 70; *Nutting v. McCutcheon*, 5 Minn. 382.

We are of opinion that the payment sought to be recovered was free from the taint of duress or other compulsion, and was voluntary. Therefore, the complaint was properly stricken out, as it showed no cause for action. This renders it unnecessary to consider the other reasons for reversal advanced by the appellant.

The judgment of the court below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, MINTURN, BLACK, HEPPENHEIMER, JJ. 9.

For reversal—BERGEN, WHITE, WILLIAMS, JJ. 3.

ARTHUR B. MELLOR ET AL., EXECUTORS, &c., PLAINTIFFS-RESPONDENTS, v. JOSEPH KAIGHN, DEFENDANT-APPELLANT.

Argued June 28, 1916—Decided November 20, 1916.

1. The proceedings of an inferior tribunal are reviewable upon appeal when the court below has jurisdiction, and by *certiorari* when it exceeds its jurisdiction.
2. *Certiorari* is a prerogative writ by which the Supreme Court exercises jurisdiction to supervise the proceedings of inferior tribunals and governmental establishments.
3. The surrogate of a county in probating a will acts judicially and holds a court; this court, however, is not one of general jurisdiction, but is an inferior tribunal of special jurisdiction.
4. The jurisdiction of a surrogate, or surrogate's court, is purely statutory, extending to the probate of wills, the granting of letters of administration and guardianship, and certain other matters mentioned in the statute.
5. When a surrogate grants probate of a will his power is exhausted and his jurisdiction over the subject-matter is at an end, and he cannot open or vacate his decree for any cause.

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On appeal from a judgment of the Supreme Court.

For the defendant-appellant, *Stackhouse & Kramer*.

For the plaintiffs-respondents, *Wilson & Carr*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. On May 26th, 1914, William B. Mellor, of Camden county, executed a paper purporting to be his last will and testament. On October 24th, 1914, he died, and on November 6th, 1914, the paper was duly admitted to probate as his last will, and letters testamentary were issued thereon to Edgar Mellor and Arthur B. Mellor, the executors named in it. After the time limited for an appeal, and on December 9th, 1915, a petition was filed with the surrogate of Camden county by Joseph Kaighn, who alleged that at the time of the making of the will so admitted to probate the testator was not of sound and disposing mind and memory, and that the subscribing witnesses well knew that fact, and that at the time of the execution of that will the testator was insane and unable to make any intelligent disposition of his property; that the will was prepared by one of the subscribing witnesses who, in conjunction with the executors, procured its execution, although all of them knew that the testator was insane and without testamentary capacity. The petitioner further averred that on March 16th, 1910, William B. Mellor made, published and declared a paper-writing as and for his last will and testament, in which he appointed the petitioner executor; that the existence of that will first came to petitioner's knowledge on November 1st, 1915; that at the time of the making of that will the testator was of sound and disposing mind and memory and had full testamentary capacity; that the will dated May 26th, 1914, is not the last will and testament of William B. Mellor, but that the will of March 16th, 1910, is the true will of the testator. The petitioner prayed that the will of 1910 be admitted to probate and the petitioner granted letters testamentary thereon, and that the will of 1914 be revoked and set aside.

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Upon the filing of this petition the surrogate of Camden county made an order requiring the executors named in it to show cause before him, the surrogate, why its prayer should not be granted. Thereupon Arthur B. Mellor and Edgar Mellor, the executors of the will which had been admitted to probate, entered a special appearance with the surrogate for the sole and only purpose of objecting to his jurisdiction to entertain the petition or make any order thereon other than to dismiss it for lack of jurisdiction. They also filed an answer reciting the special appearance and denying the jurisdiction of the surrogate to grant the relief prayed for. It appears that leave of court must be obtained to enter a special appearance (*Allman v. United Brotherhood of Carpenters*, 79 N. J. Eq. 150, 154; *affirmed*, *Ibid.* 641), and such was not obtained from the surrogate; but no point was made of this, nor could it very well have been, for the surrogate lacked jurisdiction in this case, and any answer challenging it would have properly raised the question.

Counsel for the petitioner gave notice of a motion before the surrogate to strike out the special appearance and answer, and, after hearing, the surrogate made such an order. Thereupon *certiorari* out of the Supreme Court was awarded by Mr. Justice Garrison to review the action of the surrogate in entertaining jurisdiction upon the petition. It was duly served and came on to be heard before the justice who granted it, who decided that the orders brought up by the writ should be set aside as steps in the exercise of a jurisdiction by the surrogate that does not exist.

Certiorari was the proper remedy. The proceedings of an inferior tribunal are reviewable upon appeal when the court below has jurisdiction, and by *certiorari* when it exceeds its jurisdiction. *Diament v. Lore*, 31 N. J. L. 220; *Richardson v. Smith*, 74 *Id.* 111. *Certiorari* is a prerogative writ by which the Supreme Court exercises jurisdiction to supervise the proceedings of inferior tribunals and governmental establishments. *Specht v. Central Passenger Railway Co.*, 68 *Atl. Rep.* 785; *affirmed*, 76 N. J. L. 631; *Orange v. Hussey*, 70 *Id.* 244; *In re Prudential Insurance Co.*, 82 N. J. Eq. 335.

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The surrogate of a county in probating wills acts judicially and holds a court. *Steele v. Queen*, 67 N. J. L. 99. It is, however, not a court of general jurisdiction, but one of special jurisdiction. This, in effect, was asserted by Mr. Justice Fort in writing the opinion of the Supreme Court in *Steel v. Queen*, where he said (at p. 100) that Griffith puts "the surrogate's court" under "courts of peculiar jurisdiction."

In his opinion in *Hess v. Cole*, 23 N. J. L. 116, Chief Justice Green (at p. 121) observed that the jurisdiction of the Orphans Court, though limited, is not special; that it does not exercise a mere delegated authority for special purposes; that it is a regularly constituted tribunal of justice with broad and comprehensive powers, operating upon great and varied interests, and regulated by well-settled principles. This very language would indicate that the surrogate's court is not only one of limited but of special jurisdiction. The true distinction between courts is, such as possess general, and such as have only a special jurisdiction for a limited purpose. *Den v. Hammel*, 18 *Id.* 73.

In colonial times, and later, the surrogates were appointed by the ordinary as his deputies. *Cleven. & Keasb. Cts.* 128, 129; *Ex parte Coursen*, 4 N. J. Eq. 408; *In re Thompson*, 85 *Id.* 221, 261. In section 4, paragraph 2 of the constitution of 1844, the surrogate was made a constitutional officer and the method of his selection was provided for. This changed his former status of deputy to the ordinary and made him an independent officer, whose duties are prescribed by the legislature. His jurisdiction is purely statutory and extends to the probate of wills and grant of letters of administration and guardianship and to certain other matters mentioned in the statute. His powers and duties are now devolved and provided for in the present Orphans Court act: Revision of 1898; *Comp. Stat.*, p. 3813. Section 13 of that act provides:

"The surrogates of the several counties of this state shall take depositions to wills and admit the same to probate and grant letters testamentary thereon; but in case doubts arise on the face of the will, or a caveat is put in against proving a will, or a dispute arises respecting the existence of a will,

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the surrogate shall not act in the premises, but shall issue citations to all persons concerned to appear in the Orphans Court of the same county, which court shall hear and determine the matters in controversy."

In *Murray v. Lynch*, 64 N. J. Eq. 290; *affirmed*, 65 *Id.* 399, Chancellor Magie, sitting as ordinary, held that when a surrogate has acted upon an application for the probate of a will, and has made an adjudication and a decree thereon, the power conferred upon him has been exhausted and he may not thereafter issue citations requiring the parties to appear in the Orphans Court in respect to any controversy over the probate of the will.

And this court, in *Ryno's Executors v. Ryno's Administrators*, 27 N. J. Eq. 522, held that by the grant of probate the power of the surrogate is exhausted and his jurisdiction over the subject-matter is at an end; and also that if the probate of a will were irregular or voidable for any cause, the remedy was by appeal to the ordinary or by proceedings for the revocation of letters.

In *re Whitehead's Estate*, 85 N. J. Eq. 114, Leaming, Vice Ordinary, held that the ordinary had no jurisdiction to entertain proof of a will in solemn form as a means of setting aside a decree of probate of the surrogate who had acted within his original jurisdiction and from whose decree the statutory period of review had expired.

It cannot be doubted that if the time for appeal had not expired, the petition in this case, addressed to the surrogate and praying for the vacation of the probate of Mr. Mellor's will of 1914, would not have been proffered, but, on the contrary, an appeal would have been taken.

Mr. Justice Garrison, in his memorandum deciding the question before him in this case on *certiorari*, held that under the petition proffered to the surrogate, he was confronted with a dispute respecting the existence of the will, as to which his only function would be to cite the disputants to appear in the Orphans Court, unless it be held that by indirection he is clothed with a power that is expressly denied him by statute, and further, that the inquiry as to the alleged fraud

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upon the surrogate was merely an attempt to alter and increase the statutory right of persons interested to take an appeal from the probate of a will, a matter that has not been left to judicial discretion.

In the Matter of Clement's Appeal, 25 N. J. Eq. 508, it was held by Chancellor Runyon, as ordinary, that the Orphans Court has power to revoke letters of guardianship obtained through false representations. But the Orphans Court is a court of general jurisdiction over the matters committed to it by statute. *Hess v. Cole*, *supra*; *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 286; *Dunham v. Marsh*, 52 Id. 256, 261; *Vincent v. Vincent*, 70 Id. 272; *In re Hathorn's Will*, 97 Atl. Rep. 262.

In re Evans' Will, 29 N. J. Eq. 571 (at p. 575), Chancellor Runyon, as ordinary, mooted the question as to whether a surrogate might set aside his decree when made through fraud practiced upon him.

What was meant by this court in the assertion by Mr. Justice Green, speaking for it in *Ryno's Executors v. Ryno's Administrators*, 27 N. J. Eq. (at p. 525), that if the probate of a will is irregular or voidable for any cause, the remedy is by appeal or by proceedings for the revocation of letters—that is, what was meant by the observation “proceedings for the revocation of letters” we are not called upon to decide. The assertion of the learned judge was not directed to any issue before the court and was *obiter dictum*.

Nor is there anything in the remarks of Vice Chancellor Emery in *Vincent v. Vincent*, 70 N. J. Eq. 272 (at p. 274), to the effect that courts invested with probate jurisdiction have generally power to check and revise proceedings for probate tainted with mistake, fraud or illegality, indicating an opinion that the surrogates have that power. He was careful to say that probate courts have *generally* (which suggests qualification and exception), and did not say they had universally, the jurisdiction to set aside probate obtained through fraud; and, besides, he was not dealing with the surrogate's but the Orphans Court, and expressly held that it (the Orphans Court) was a superior court of general jurisdiction, and, therefore, has the power in question, and for that reason

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he sustained a demurrer and dismissed a bill, having for its object the setting aside of the probate of a will proved in the Orphans Court.

The observation of McGill, ordinary, in *Straub's Case*, 49 N. J. Eq. 264 (at p. 265), that when the time within which an appeal may be taken from the order of a surrogate has elapsed, the judgment is a finality until it be disturbed by an attack upon it which should originate before the surrogate, is predicated upon *In re Evans*, *supra*, which is cited as authority. As shown above, it was not decided (*In re Evans*) that an attack upon a probate adjudged by a surrogate could be originated before him. On the contrary, the question was only mooted in the latter case. Therefore, the learned ordinary's assertion in the Straub case is without support.

The counsel for appellant argue that if the decision of Mr. Justice Garrison in the Supreme Court is right, a fraudulent decree, or one entered by inadvertence or mistake in a surrogate's court must remain of record always if the time for appeal has lapsed, which would enable parties interested in perpetrating a gross fraud to take advantage of it for all time if they could conceal the fraud during the period in which an appeal could be taken from the judgment of the surrogate. We do not say there is no remedy, nor are we called upon to make any deliverance on this question. It may be that there is a remedy in equity. See *Vincent v. Vincent*, 70 N. J. Eq. (at p. 274), and *Crawford v. Lees*, 84 *Id.* 324, 341.

We are clearly of opinion that the surrogate of Camden county exceeded his authority in entertaining jurisdiction of the petition to revoke probate, and that, therefore, the judgment of the Supreme Court setting aside his action must be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 13.

For reversal—None.

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ROSEVILLE TRUST COMPANY, PLAINTIFF-RESPONDENT,
v. A. W. BARNEY, JR., DEFENDANT-APPELLANT.

Argued March 14, 1916—Decided November 20, 1916.

1. Section 22 of the act concerning trust companies (*Comp. Stat.*, p. 5664), amended *Pamph. L.* 1913, p. 282, authorizes the commissioner of banking and insurance, in certain circumstances, to take possession, as statutory agent, of a trust company's property and business and liquidate the same, and empowers him to prosecute and defend suits and other legal proceedings in the name of the trust company.
2. A person indebted to a trust company on a promissory note, and having a deposit to his credit therein when the commissioner of banking and insurance takes possession, is a creditor of the company, and as such entitled to set off his deposit against the amount due on the note, under the act concerning set-off. *Comp. Stat.*, § 4836, § 1.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 146.

For the defendant-appellant, *Otto A. Steiffel*.

For the plaintiff-respondent, *Peirce & Hoover*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. On August 14th, 1913, the commissioner of banking and insurance took charge of the property and business of the Roseville Trust Company, under the provisions of the act concerning trust companies (*Comp. Stat.*, p. 5664), amended *Pamph. L.* 1913, p. 282. The commissioner found, among the assets of the bank, a note for \$400 made by A. W. Barney to his son, A. W. Barney, Jr., the defendant, payable three months after date. The note was drawn to the order of the maker and by him endorsed and turned over to his son who also endorsed it. On the same day the note was delivered to the Roseville Trust Company for A. W. Barney, Jr., who received a credit for it on

the books of the company in the sum of \$394. When the commissioner took possession, the books of the trust company showed a balance of \$467.99 to the credit of A. W. Barney, Jr., which included the \$394 passed to his credit upon the purchase or discount of the note mentioned. Suit was brought by the commissioner for and in the name of the trust company, against the younger Barney in the First District Court of Newark upon the note in question, and he pleaded set-off for the sum of \$467.99. The trial judge disallowed the set-off and gave judgment for the plaintiff (the trust company) and the Supreme Court, on appeal, sustained that judgment. The judge of the District Court decided that there was no defence at law by way of set-off, and the Supreme Court held that the defendant's claim was not within the statute of set-off and affirmed that decision. From the judgment entered in the last-mentioned court the defendant has appealed to this court.

The act concerning trust companies (Revision of 1899; *Comp. Stat.*, p. 5654), was amended with reference to sections 22, 23 and 24, by act of April 1st, 1913. *Pamph. L.*, p. 282.

The commissioner of banking and insurance, as already remarked, took possession of the property and business of the Roseville Trust Company on August 14th, 1913, and, therefore, acted under the powers conferred upon him by the amended section 22, which provides that whenever it shall appear to the commissioner that any trust company has violated its charter or any law of this state, or is conducting its business in an unsafe or unauthorized manner, or in certain other circumstances mentioned, he may forthwith take possession of the property and business of such trust company and retain such possession until it shall resume business or its affairs be finally liquidated as therein provided. Provision is then made that the trust company may, with the consent of the commissioner, resume business upon such conditions as may be approved by him. The commissioner is authorized to collect all debts due and claims belonging to the trust company, and, upon the order of the Court of Chancery, he may sell or compound all bad or doubtful debts and

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on like order may sell all the real or personal property of such trust company. It is also provided that for the purpose of executing and performing any of the powers and duties thereby conferred upon him, the commissioner may, "in the name of the trust company," execute and deliver all deeds, assignments, releases and other instruments necessary and proper to effectuate any sale of real or personal property, or compromise, authorized by the Court of Chancery; and any deed or other instrument, executed pursuant to the authority thereby given, shall be as valid and effectual for all purposes as though the same had been executed by the officers of such trust company by the authority of its board of directors. Further, that out of the moneys collected by the commissioner, and at any time after the expiration of the date fixed for the presentation of claims against the company, the Court of Chancery may authorize the commissioner to declare out of the funds remaining in his hands, after the payment of expenses, one or more dividends; and whenever the commissioner shall have paid to every depositor and creditor (not including stockholders) whose claims shall have been duly proved and allowed, the full amount of such claims, and shall have made proper provision for unclaimed and unpaid deposits or dividends, and shall have paid all the expenses of liquidation, he shall call a meeting of the stockholders who shall determine whether the commissioner shall be continued as liquidator and shall wind up the affairs of the company, or whether an agent or agents shall be elected for that purpose.

Section 24 of the act, as amended, provides that whenever any trust company shall become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, the attorney-general, or any creditor or stockholder, may apply to the Court of Chancery for an injunction and the appointment of a receiver, and the court being satisfied of the sufficiency of the application, and of the truth of the allegations, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear

to the court that the trust company has become insolvent, and is not about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, may issue an injunction to restrain such trust company and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its estate, &c., except to a receiver appointed by the court, until the court shall otherwise order.

Section 25, which has not been amended, authorizes the appointment of a receiver for the creditors and stockholders of the trust company with full power and authority to demand, sue for, collect and take into his possession all the property of every description of the corporation and to institute suits at law and in equity for the recovery of any of its property or demands, and in case of mutual dealings between the corporation and any person to allow just set-offs in all cases in which the same ought to be allowed according to law and equity.

Thus it will be seen that the act concerning trust companies contains two schemes for the winding up of such institutions, one by the commissioner of banking and insurance as a statutory agent, and the other by a receiver in insolvency proceedings.

No right of set-off is given in section 22, either as it originally stood or as it now stands amended. As it originally stood it authorized the commissioner, if he had reason to conclude that any trust company was in an unsound or unsafe condition, to forthwith take possession of its property and business and retain such possession until the termination of an action or proceeding to be instituted by the attorney general, or until the appointment of a receiver by the Court of Chancery. And section 24, as it originally stood, provided that whenever any trust company should become insolvent or should suspend its ordinary business for want of funds to carry on the same, the attorney-general or any creditor, or stockholder, might apply to the Court of Chancery for an injunction and the appointment of a receiver. Then followed a provision

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that whenever it should appear to the Court of Chancery, on application of the attorney-general, that any trust company was in an unsound condition because of illegal or unsafe investments (or that some of the other conditions existed which are now described in section 22, as amended), the court might issue an injunction to restrain such company and its officers and agents from exercising any of its privileges and franchises and from collecting or receiving any debts or from paying out any of its estate, moneys, funds, lands, tenements or effects except to a receiver appointed by the court, until the court should otherwise order.

Thus it appears that the commissioner of banking and insurance, as the act concerning trust companies originally stood, did not have the powers of a liquidator, but only power to take possession of the property and business of a trust company until the termination of an action or proceeding instituted by the attorney-general, or until the appointment of a receiver by the Court of Chancery. There was then no occasion for any provision regarding set-off in section 22; that provision was naturally and properly made in section 25, which defined the powers and duties of a receiver to be appointed by the Court of Chancery.

It will be observed that the winding up of an insolvent trust company, a proceeding essentially judicial in its nature, is confided to the Court of Chancery, while for corporate acts not in and of themselves amounting to insolvency, the commissioner of banking and insurance by section 22 of the Trust Company act, as amended, is authorized to take possession of the company's business and liquidate its affairs. He is not, like a receiver, vested with title to the corporation's property, nor empowered to sue or be sued in his name as commissioner, but only to act for the company and for the benefit of its creditors and stockholders, doing all lawful acts in the name of the company itself. During his administration of its affairs the corporate entity itself continues in existence, and everything done for and on its behalf by the commissioner, must be done in its name. The rights of creditors, at least so far as reducing their claims to judgment

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is concerned, are not affected by the act, which makes express provision that the commissioner, in the name of the company, may prosecute and defend all suits and other legal proceedings.

The relation between a bank and its depositors is that of debtor and creditor. *Tufts v. People's Bank*, 59 N. J. L. 380; *Campbell, Receiver, v. Watson*, 62 N. J. Eq. 396. Between persons occupying that relation to each other, set-off at law, under the statute, applies. The act concerning set-off (*Comp. Stat.*, p. 4836, § 1) provides that if any two or more persons be indebted to each other, such debts not being for unliquidated damages, may be set off against each other. Within the very wording of this act, the set-off pleaded by the defendant in the court of first instance, was valid and should have been allowed. Its disallowance was error. This view leads to a reversal of the judgment of the Supreme Court and a remand of the record for further proceedings according to law.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, TAYLOR, JJ. 11.

SAMUEL R. SAVAGE, PLAINTIFF-RESPONDENT, v. PUBLIC SERVICE RAILWAY COMPANY, A CORPORATION, DEFENDANT-APPELLANT.

Submitted March 27, 1916—Decided November 20, 1916.

Plaintiff drove an automobile at a speed of fifteen miles an hour in a heavy snowstorm on trolley tracks covered with about two feet of snow on a two per cent. down grade, that is, a vertical drop of two feet in every one hundred lineal feet, with snow beating in his eyes through a slight opening in the windshield, which permitted him to see no farther than twenty-five feet ahead, know-

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ing that a trolley car was likely to approach him head-on from the opposite direction, and which he was looking for; which automobile, so then and there traveling, it appears, could not be stopped within forty-five feet, although he himself did not know within what distance he could have stopped it—when a trolley car appeared within the range of his vision, so limited, coming toward him at a speed of eight miles an hour, without giving any audible signal, and with which he collided, notwithstanding he did what he could to stop his automobile by working the clutch and brakes; and, as a result of the collision, his automobile was damaged and he himself was injured. *Held*, that plaintiff was guilty of contributory negligence, and, therefore, not entitled to recover.

On appeal from the Supreme Court.

For the appellant, *Lefferts S. Hoffman, Leonard J. Tynan* and *Joseph Coult, Jr.*

For the respondent, *John Boyd Avis.*

The opinion of the court was delivered by

WALKER, CHANCELLOR. The plaintiff-respondent was injured in a head-on collision between his automobile and a trolley car of the defendant-appellant. The case was tried at circuit before judge and jury, and resulted in a verdict in the plaintiff's favor. At the close of plaintiff's case a motion to nonsuit was made and denied, and after the defendant's proof was put in a motion to direct a verdict for the defendant was made and overruled. After judgment was entered on the verdict an appeal was taken to this court.

The grounds of appeal are five in number, but only two were relied upon by the appellant. They were (3) because the trial court, although requested so to do, at the close of the whole case, refused to direct a verdict in favor of the defendant on the ground that no negligence on its part was disclosed, and (4) because the trial court, although requested so to do, at the close of the whole case, refused to direct a verdict in favor of the defendant on the ground that the plaintiff was clearly guilty of negligence that contributed to the happening of the accident.

We think the trial judge committed error in refusing to direct a verdict for the defendant on the ground of the plaintiff's contributory negligence, and although the question of defendant's negligence was argued in the briefs of counsel, we find upon inspection of the record that the point was not made, or rather having been raised on the motion to nonsuit, it was on the argument of that motion abandoned, and the motion to direct a verdict was rested on the single ground to which the motion to nonsuit was narrowed. Therefore, the question as to whether the defendant company, through the conduct of its motorman, was negligent, is not before us for decision, but even if it were, and if decided adversely to the defendant, the plaintiff's contributory negligence would still be a disposing factor in the case and would require a reversal.

The pertinent facts shortly, were these: The plaintiff, a truck-farmer, living at a place called Fairview, was in Woodbury on a certain day with his automobile. A severe snow-storm was raging and he procured enough rope to wrap both the rear tires. He had no chains with him. The ropes were put on, he says, so that he would have better protection from skidding, although it appears they were practically valueless for the purpose. He started out Cooper street, Woodbury, about one o'clock P. M. He was alone. As he was going out Cooper street, snow was lying about six inches to a foot deep until he got past a certain country club where it was drifting and was as much as two feet deep, and two and a half on the side where wagons and automobiles were accustomed to go. On the side not used by the trolley tracks there were telephone and trolley poles and a ditch along the road. This, he says, led him to take to the tracks. There appears to have been only a single track at the point where the accident happened. The plaintiff was on the right hand side going out; his reason for being in the trolley tracks was, he says, the presence of the telephone and trolley poles and ditch on the other side. He admitted he was running at a speed of fifteen miles an hour. He looked out through a slight opening in the windshield, but the snow was beating in his eyes.

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He had to stoop down a trifle to see out. If he had opened the windshield all the way he could have seen out, but he said he was under the impression that that would let in more snow than he could see through. Suddenly a trolley car came in sight about twenty or twenty-five feet in front of him. He had not heard any signal of bell or whistle. The wind was blowing toward him and away from the car. He did what he could to stop his automobile by working the clutch and brakes, and had slowed up but did not come to a standstill. The trolley car was moving, but he could not see whether faster or slower than he. Another object he had in taking to the trolley tracks was to prevent skidding, as it is not easy to slide out of them; it being pretty hard to get out of wet trolley tracks after one gets in them. He had used the road often before and the tracks when it was necessary. He was going down hill at the time of the accident, the grade of which he was unable to state. The trolley car came into the road from a turn and had run at least one hundred and thirty-nine feet in a straight line toward him before the collision, but he did not see it because it was snowing so heavily, although he was looking for it. He did not know within what distance he could stop his automobile in that snow-storm. He said he was in a dangerous place and knew he was likely to meet a trolley car coming in the opposite direction and he could not see more than twenty to twenty-five feet ahead as he was going down a hill. He had a horn on the automobile for giving warning, but did not blow it. He said the trolley car gave no audible signal.

Witnesses called by the plaintiff corroborated him as to the trolley car giving no audible signal; also that it was running at a moderate rate of speed, about eight miles an hour.

For the defendant it was proved that there was a two per cent. down grade at the point where the accident occurred, that is, a vertical drop of two feet in every one hundred lineal feet. One witness who had experience in driving the same kind of automobile that the plaintiff owned, and which was injured by the collision, testified that under the conditions existing at the time of the accident, the automobile could not

have been stopped under fifty feet. Another witness said forty-five to sixty feet.

Now, as no question of the defendant's negligence resides in the record before us, it is only necessary to consider and decide whether the plaintiff—driving an automobile at a speed of fifteen miles an hour in a heavy snowstorm on trolley tracks covered with about two feet of snow on a two per cent. down grade, that is, a vertical drop of two feet in every one hundred lineal feet, with snow beating in his eyes through a slight opening in the windshield which permitted him to see no farther than twenty-five feet ahead, knowing that a trolley car was likely to approach him head-on from the opposite direction, and which he was looking for, which automobile, so then and there traveling, it appears could not be stopped within forty-five feet, although he himself did not know within what distance he could have stopped it when a trolley car appeared within the range of his vision, so limited, coming toward him at a speed of eight miles an hour without giving any audible signal, and with which he collided, notwithstanding he did what he could to stop his automobile by working the clutch and brakes, and his automobile was damaged and he himself injured—exercised reasonable care for his own safety. We are of opinion that he did not.

The automobile, as stated, was traveling at approximately fifteen miles an hour and the trolley car at eight, resulting in the two vehicles approaching one another at the rate of twenty-three miles an hour, at which rate of speed it would take them, after the plaintiff saw the trolley car, about three-quarters of a second to cover the distance of about twenty-five feet and come together in collision. In this twenty-five feet, considering the disparity in speed between the two vehicles, the automobile traversed about seventeen feet and the trolley car about eight. As according to testimony, the plaintiff could not have stopped the automobile within the whole distance of twenty-five feet, which conclusively appears, then, even if the trolley car had been at a standstill, the accident would nevertheless have happened.

The trolley car could not have left the tracks. It was en-

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titled to the right of way. *North Hudson County Railroad Co. v. Isley*, 49 N. J. L. 468. The plaintiff, who expected to meet it, should have been in a position to turn out of the tracks when he did meet it. As he could see no more than twenty-five feet ahead of him, and as according to his own statement, he took to the tracks to prevent skidding as it was not easy to slide out of them, it is not perceived but that upon the slightest reflection, he must have known that it was quite impossible for him to avoid a collision with a car which he expected to meet coming head-on from the opposite direction.

The question of contributory negligence on the part of the plaintiff, it is urged in his behalf, was a question for the jury, and this contention is supported by citation of cases which deal with disputed questions of fact relating to contributory negligence, and those which hold that where the question of contributory negligence is in doubt, or where it is possible to draw different inferences as to it, the question is for the jury. The doctrine here invoked has no application to the facts of the case at bar, for when it was rested in the trial court, there were no disputed questions of fact, and on the facts the plaintiff's contribution of negligence—but for which the accident would not have happened—was all apparent. It is only when the question of contributory negligence is placed in the realm of uncertainty and doubt, and presents the form of a debatable question that its solution is committed to a jury. *Munroe v. Pennsylvania Railroad Co.*, 85 N. J. L. 688, 692; *affirmed*, S. C., 87 *Id.* 701.

The requested direction of a verdict for the defendant should have been granted, and because it was not, the judgment must be reversed.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

89 N. J. L. Conservation & Development Bd. v. Veeder.

THE BOARD OF CONSERVATION AND DEVELOPMENT,
APPELLANT, v. PETER Y. VEEDER, RESPONDENT.

Argued June 29, 30, 1916—Decided November 20, 1916.

1. Under section 11 of an act entitled "An act for the appointment of firewardens, the prevention of forest fires, and the repeal of sundry acts relating thereto," approved April 18th, 1906, as amended by *Pamph. L. 1911, p. 56*, any person who sets fire to, or causes to be burned, any forest land, comes within the condemnation of the statute, irrespective of whether his act in so doing is in the execution of a preconceived purpose, or whether it is wholly unintentional.
2. In construing a remedial statute, the court should always consider the mischief which the legislative body sought to remedy, as well as the remedy intended to be provided by it to cure the mischief.

On appeal from a judgment of the Supreme Court, whose opinion is reported in 87 N. J. L. 479.

For the appellant, *Josiah Stryker* and *John W. Wescott*, attorney-general.

For the respondent, *David A. Veeder*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. This action was originally brought by the board of conservation and development, before a justice of the peace of Ocean county, to enforce a penalty for the alleged violation by the defendant, Veeder, of section 11 of an act of the legislature entitled "An act for the appointment of fire wardens, the prevention of forest fires, and the repeal of sundry acts relating thereto," approved April 18th, 1906, as amended March 15th, 1911. The trial of the action resulted in a judgment in favor of the plaintiff. An appeal was taken by the defendant to the Court of Common Pleas of the county, and there a judgment of non-

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suit was rendered against the board. This judgment having been removed to the Supreme Court for review was affirmed by that tribunal, and from the judgment of affirmance the present appeal is taken.

Section 11 of the act under which the present prosecution was instituted, as amended in 1911, reads as follows: "No person shall set fire to or burn, or cause to be burned, any waste land, brush land, or forest land, but nothing in this section shall be interpreted to forbid any person from setting a back fire, or ground fire, or a surface fire, upon his own property to protect the same; *provided, however*, if such fire be permitted to escape, or does escape, to adjoining property, then the person setting such fire, or causing it to be set, shall be deemed to have violated the provisions of this section." *Pamph. L. 1911, p. 56.*

The ground upon which the judgment of nonsuit was directed by the Common Pleas, and upon which it was affirmed by the Supreme Court, was that, in order to hold the defendant accountable under section 11 of the act, it was essential that it should have appeared that the causing of forest land to be burned (which was the charge against the defendant) was his intentional act; and that the undisputed testimony in the case showed that the setting fire to this forest land was wholly unintentional on his part resulting from his inability to control the spread of a fire which he had started upon his own meadow land for the purpose of burning off the old grass thereon.

The contention on the part of the board was, and is, that this construction of the act is too narrow; and that by force of its provision any person who sets fire to, or causes to be burned, any forest land, comes within the condemnation of the statute, whether his act in doing so is in the execution of a preconceived purpose, or whether it is wholly unintentional.

The primary object of the act of 1906, as expressed in its title, is the preventing of forest fires, and the various provisions of the statute are directed to the accomplishment of

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that object. That the legislature, when it passed the original act in 1906, was not seeking to prevent only such forest fires as were intentionally set, is manifest from a reading of section 11 of the statute as originally enacted. The language used is, "No person shall willfully, negligently, carelessly, or in any manner, set fire to, or burn, or cause to be burned, any waste land, brush land, or forest land," &c. *Pamph. L.*, p. 225. In 1908 an act was passed amending eight of the seventeen sections of the original statute. *Pamph. L.*, p. 422. Among the sections amended was number 11. The change there consisted in eliminating the words "willfully, negligently, carelessly, or in any manner," and the amendment of 1911 left this language unchanged. But the purpose of this elimination, in our opinion, was merely to drop out unnecessary words, and not to limit the scope of the original provision. As originally passed the statute covered all cases of burning, whether done willfully, or negligently, or carelessly, or in any other manner. The elimination of the words either leaves the meaning of the statute unchanged, or it relieves every person who willfully sets fire to forest land, or who negligently or carelessly sets such a fire, or who in any manner does so, from the penalty imposed by the act; for it will hardly do to say that a court, by judicial construction, may read into the statute one of the words eliminated by the legislature (viz., willful, so far as it includes intentional) and ignore all the others.

The act under consideration is a remedial one, and in determining the construction to be given to it the court is to consider what the mischief was that the legislature sought to remedy, as well as the remedy intended to be provided by that body to cure the mischief. And, as was said by Sir William Blackstone, in dealing with this subject, "It is the business of the judges so to construe such statutes as to suppress the mischief, and advance the remedy." A construction of the amendment to the statute, which limits its operation to fires intentionally set, can hardly be said to suppress the mischief struck at by the statute, or to advance the remedy

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provided by it; for it is probably true, as was asserted by the state geologist in a report submitted to the legislature a few years before the passage of the original act, and cited in the brief of the attorney-general, that most of our forest fires are the result of the escape of sparks from passing locomotives, and of the careless acts of the persons by whom they are started, and are very seldom willfully and maliciously set.

The act as originally passed plainly was applicable to all forest fires, however started. In determining the purpose of the amendment of section 11, it is to be remembered that the legislature, some years before its enactment (in 1902), had made the intentional setting of such fires a criminal act, punishable by a fine of not more than \$1,000, or imprisonment not exceeding three years, or both. *Pamph..L., p. 248.*

The apparent absurdity of enacting subsequent and independent legislation solely for the purpose of adding to this punishment a fine of not less than \$50, nor more than \$200 (the penalty imposed by the statute now under consideration), ought not to be attributed to the law making body, unless the language used by it makes it plain that such was its purpose.

We conclude that the defendant below (Veeder), in causing the fire which was the subject-matter of his prosecution, came within the condemnation of the statute, and that the judgment under review should be reversed.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, MINTURN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, JJ. 10.

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THE STATE, DEFENDANT IN ERROR, v. MICHAEL ROMBOLO, PLAINTIFF IN ERROR.

Submitted August 10, 1916—Decided November 20, 1916.

1. In drawing a jury in a criminal case, from a special panel, the requirements of section 27 and of section 83 of the Criminal Procedure act should be strictly followed; and it is error to draw a jury from the box which contains only the names of a part of those who constituted the special panel.
2. Where the record of a previous conviction of defendant, for a crime committed in another state, is offered in evidence pursuant to section 1 of the Evidence act (*Comp. Stat.*, p. 2217), full faith and credit must be given to it when properly certified, even though it contains matters which would form no part of a judgment record made up in accordance with our own rules and regulations.
3. A photograph, which was said to have been taken of defendant while incarcerated in a reformatory, upon the back of which were endorsements stating that the original thereof was in confinement under a charge of burglary, has no probative force; the endorsements thereon are hearsay, and, consequently, it cannot be introduced in evidence.
4. In view of the fact that the provisions of *Pamph. L. 1916, p. 576*, gives to the jury the power to fix the punishment of one convicted by them of first degree murder at either life imprisonment or death, it is not objectionable for the court to inform the jury of the power of the court of pardons to override their verdict by an exercise of the pardoning power.

On writ of error to the Hudson Oyer and Terminer.

For the plaintiff in error, *Richard Doherty*.

For the state, *Robert S. Hudspeth*, prosecutor of the pleas.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The defendant below having been convicted of the crime of murder in the first degree now seeks to have that conviction set aside for alleged errors occurring during the course of the trial.

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The first reason for reversal urged before us is that the jury which tried him was impaneled in violation of the statutory provisions regulating the matter, and in disregard of his objection. The undisputed facts relating to the drawing of the jury are as follows: A special panel of forty-eight jurors had been drawn from the general panel, pursuant to the requirement of section 82 of the Criminal Procedure act (*Comp. Stat.*, p. 1847), for the purpose of trying the indictment against the defendant. When the case was moved the assistant to the sheriff, who was charged with the duty of drawing the jury, placed in the box the names of only thirty-one members of the special panel, and proceeded to draw the twelve names from this number, leaving the names of the other seventeen out of the box, because—as he happened to know—they were then engaged in jury service in other of the county courts. He did this upon his own responsibility, and without notifying either the court or counsel of the situation, until all of the thirty-one names had been drawn from the box. At that time only seven jurors had been selected for service. The court thereupon adjourned until two o'clock in the afternoon, and upon reconvening was informed by the sheriff's assistant that nine of the seventeen jurors whose names had been left out of the box were then present. Upon this information being received the court directed the names of these nine to be placed in the box, and the drawing of the jury to be proceeded with. Three more jurors were obtained from this new drawing, and then—this second division of the special panel having also been exhausted—the court directed the names of the remaining members of the general panel to be placed in the box, and the last two jurors were selected therefrom. The defendant's peremptory challenges were all used before the jury box was filled.

The method provided by the legislature for drawing a jury, either from a general or special panel, is to write or print the name of each member thereof on a separate slip of paper, place all the slips in the box, shake the box so as to intermix the papers, and then draw such papers from the box, one at a time, until twelve persons whose names are writ-

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ten thereon (and who have not been excused, or successfully challenged) shall appear. *Comp. Stat.*, p. 2975, § 27.

When, in drawing a jury from a special panel in a criminal case, the panel is exhausted, *from any cause*, before a jury for the trial of the indictment is obtained, the law requires that talesmen be taken from the general panel, and that the empty seats in the jury box be filled from them by a drawing in the manner already indicated. *Comp. Stat.*, p. 1847, § 83.

Strictly speaking, the names of all members of the panel who have not previously been excused from service should be placed in the sheriff's box, even those who are not present in court when the jury is ordered to be drawn, for some or all of the absentees may appear before their names come out of the box. It may be conceded that a failure in this regard is a harmless irregularity, provided that the names of all of the members of the panel, who answer the roll call, or come into court while the jury is being selected, are put in the box before the drawing of the jury is begun; but we do not doubt the right of a defendant to insist upon this proviso. The statute gives it to him by necessary implication, when it declares that if the special panel "shall be exhausted from any cause" before a jury shall be obtained, talesmen shall be taken from the general panel. The importance to the defendant of having the names of all the persons from whom the jury will be selected placed together in the box is not merely imaginary. The value of his right to challenge, as was said by the Supreme Court in *State v. Lapp*, 84 N. J. L. 19, 21, depends to a considerable degree upon the order in which the names are drawn from the box, and may be radically affected by placing therein less than two-thirds of the whole number of names on the panel, and then, after exhausting those names, place the remainder (or a portion thereof) of the names upon the panel in the box, and fill up the jury from this second installment.

The method adopted in the drawing of the jury in the present case was a clear violation of the statute, and worked

to the manifest injury of the defendant. The conviction under review must, therefore, be reversed for this reason.

As the case must go back for a new trial, we deem it advisable to refer to certain other causes of reversal which were argued before us.

The defendant, on his cross-examination, was asked if he had not been convicted of the crime of burglary in one of the criminal courts of the State of Pennsylvania. His answer was in the negative. The state then produced a copy of the record of the conviction of the defendant for burglary in the Court of Quarter Sessions for Westmoreland county, in the State of Pennsylvania, duly certified in accordance with the provisions of the act of congress, and offered it in evidence for the purpose of impeaching the defendant's credit as a witness. Its admission was objected to, and the overruling of the objection is set up as a ground of reversal.

Section 1 of our Evidence act (*Comp. Stat.*, p. 2217) provides that the state may prove the prior conviction of a defendant who offers himself as a witness, either on his cross-examination, or by the production of the record thereof, for the purpose of affecting his credit. Counsel does not deny the state's right to do this, but insists that, notwithstanding the statute, the paper offered was not evidential, because it contained many matters which have no place in a formal record, including the preliminary complaint made before a justice of the peace, and a letter written by the district attorney to one of the court officers with relation to the subpoenaing of witnesses for the trial. It is true, as counsel contends, that these matters form no part of a judgment record in a criminal case made up in accordance with the rules and regulations of the common law. But that fact is immaterial. Each of our sister states is sovereign, so far as the determination of what shall constitute a proper record in a judicial proceeding had before its courts is concerned. Section 1, article 4, of the federal constitution requires that full faith and credit shall be given in each state to the public records and judicial proceedings of every other state. By force of this provision the courts of this state are bound to accept

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the records of the superior courts of our sister states, when properly certified to us in accordance with the act of congress, as being just what they purport to be, and have no power to reject them, when offered in evidence, because they are not made up in the manner prescribed by our own rules and regulations, and contain matters, which according to our ideas of legal rules, would seem to have no proper place therein. It may be that some parts of the record which has been subjected to criticism are not evidential against the defendant; but this we are not called upon to determine. The record of conviction is admissible under our Evidence act for the purpose of affecting the defendant's credit; and, being indivisible, the only way to raise the question suggested is to request the court to instruct the jury to disregard those portions thereof which are claimed to be incompetent as evidence against the defendant. No such request having been made, we are not called upon now even to consider whether such a course would be justified under legal principles.

The state produced and introduced in evidence, over the objection of the defendant, a photograph which was said to have been taken of him while he was incarcerated in a Pennsylvania reformatory. Upon the back of this photograph were certain endorsements, among them that the original thereof was in confinement under a charge of burglary, and that he had violated his parole. We are unable to see that the photograph had any probative value, and consider that, had the contrary been the fact, the endorsements written upon it destroyed its efficacy as an instrument of evidence; for these statements were the veriest hearsay, coming from an unknown source, and not made under the sanctity of an oath. We conclude, therefore, that this photograph should have been excluded upon the objection of the defendant.

It is further contended that the defendant's conviction should be set aside, because the trial court improperly told the jury that the Court of Pardons, if it saw fit to do so, could set the defendant free, or grant him a pardon, if the jury found him guilty of murder in the first degree with a recommendation. The instruction now complained of came

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about in the following way: The court, at the conclusion of its charge to the jury, pointed out that the legislature in the preceding winter had passed a law which declared that "Every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers, shall suffer death, unless the jury at the time of rendering the verdict in such case shall recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed" (*Pamph. L.* 1916, p. 576), and instructed them that under this statute it would be their duty, in case they found the defendant guilty of murder in the first degree, to determine whether or not they would make the recommendation. The jury having then retired for the consideration of its verdict, afterward came into court and submitted the following question: "Can a man be pardoned if found guilty of murder in the first degree with recommendation?" The judicial declaration which is now complained of was in answer to this question. No objection was made, or exception taken, to this deliverance, and, therefore, no assignment of error, or reason for reversal could, properly, be based upon it. But, as the matter is one of general importance in view of the legislation referred to by the trial court, it seems to us advisable that we should express our opinion concerning it. Prior to the enactment of this statute the jury in a homicide case had no function to perform, except the ascertainment and declaration of the guilt or innocence of the defendant, and, in case he was found guilty, to declare the degree of his crime. The punishment which should follow the conviction was a matter with which the jury had nothing to do. By force of this legislation, however, an additional burden is put upon the jury, in case they shall adjudge the defendant to be guilty of murder in the first degree, and that is to determine, within the limits fixed by the statute, what his punishment shall be. Naturally one of the elements to be considered by them in determining that punishment is whether, if they shall by their verdict impose life imprisonment, it can be disregarded and set at naught by the Court of Pardons. We see no reason why they should not be informed

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of the power of the Court of Pardons if they so desire, and, as a necessary consequence, we see no impropriety in the trial court, either at the request of the jury, or without such request, apprising that body with relation to the power of supervision possessed by the pardoning tribunal.

For the reasons already indicated the judgment under review will be reversed.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

ELBERT H. TRAVIS, RESPONDENT, v. GUSTAVA UNKART,
INDIVIDUALLY, AND AS EXECUTRIX OF MARY E.
UNKART, DECEASED, APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

1. A contract, made by a sister, because of a threat to subject her brother to imprisonment, is void for duress; and the question whether or not, in view of conflicting testimony, there was such a threat, is one for the jury.
2. Duress, to be available as a defence in an action upon contract, must have been exercised upon him or her who sets it up as a defence by him who claims the benefit of the contract, or by someone acting in his behalf or with his knowledge.

On appeal from a judgment of the Supreme Court.

For the appellant, *Wendell J. Wright*.

For the respondent, *Henry T. Stetson*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. This action was brought to recover the amount due upon a promissory note for \$2,676,

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executed by Mary E. Unkart (now deceased), to the order of the plaintiff, and endorsed by the defendant, Gustava Unkart, individually. The making and endorsement of the note were admitted, the defences being (1) that the signatures of the maker and endorser were obtained by threats and duress; and (2) that the note was without consideration.

The undisputed testimony in the case showed that this note was given for the purpose of discharging two other notes made to the order of the plaintiff by L. Fred Unkart, a son of Mary, and a brother of Gustava; and that these two notes were surrendered by the plaintiff to the defendant, Gustava Unkart, at the time of the delivery to him of the note in suit, and have never been returned to him. The defence of lack of consideration therefore failed.

In support of the defence that the note was obtained by duress the defendant, Gustava Unkart, testified to the following facts: Having received notice that the plaintiff had brought suit against her brother upon the two notes executed to him by the latter, and her brother being then away from home, she called at the plaintiff's office to inquire about the matter. During the course of their conversation the plaintiff told her that she and her mother had better advance the money to take up the notes then in suit, or give a note for that purpose; that her brother had signed bonds in the custom house (he was a custom-house broker), giving as security a certain piece of property in Tenafly, and that if the brother was not the owner of this property—as the sister asserted—he had committed a state's prison offence; and intimated that if the mother and daughter did not take up the son's notes he would send the brother to state's prison. She further testified that she endorsed the note involved in the present litigation in order to protect her brother from the criminal prosecution. The plaintiff, in rebuttal, took the witness-stand and denied ever having had any conversation with this defendant, suggesting that her brother had committed a state's prison offence, or that if the brother's notes were not taken up he would send him there. On this state of the proofs the trial court considered that even if the testimony on the part of the

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defence was given full and complete credence, a case of duress had not been made out against the plaintiff; and for this reason directed a verdict for the full amount of his claim, with interest, against the defendant, Gustava Unkart, both individually and as executrix of her mother. The question presented by this appeal is whether this judicial action can be legally justified.

It is to be observed that neither in the testimony which has been excerpted, nor in any other part of the proofs, does it appear as a fact that L. Fred Unkart had ever defrauded the custom-house officials in the way suggested in the conversation between the parties as related by Gustava Unkart, or that he had committed any offence which would have subjected him to a criminal prosecution; and that no presumption exists in favor of his criminality. This being so, the case, in its legal aspect, is almost identical with that of *Ball v. Ball*, 79 N. J. Eq. 170, so far as the defendant is concerned individually. In that case a conveyance was made by parents to a creditor of their son, under pressure of a threat to have the son criminally prosecuted. The conveyance was made in the honest belief by the parents that the son had subjected himself to such a prosecution, although the contrary was the fact. It was held by this court that the conveyance so obtained was void for duress exercised upon the grantors by the grantee.

Ordinarily, contracts which have been set aside upon the ground of duress are made by a parent or child on a threat of imprisonment against the other, or by a husband or wife on a like threat. There seems no reason, however, why the doctrine should not be equally applicable in the case of brother and sister, and, indeed, it has been so held when the question has been presented for determination. *Schultz v. Catlin*, 78 Wis. 611; *Davis v. Luster*, 64 Mo. 43.

We conclude, therefore, that if the testimony given by Gustava Unkart on the witness-stand be true, her contract of endorsement was void by reason of illegal duress exerted upon her by the plaintiff. Whether or not her story was truthful was, of course, a question to be determined by the jury. The judgment against her, individually, having been improperly directed must be reversed.

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The judgment against the estate of the deceased mother stands on a different footing. Duress, to be available as a defence in an action upon contract, must have been exercised upon him or her who sets it up as a defence by him who claims the benefit of the contract, or by someone acting in his behalf or with his knowledge. *Mullin v. Leamy*, 80 N. J. L. 484. There was no attempt on the part of the defence to prove that the plaintiff had any knowledge that what he had stated (as testified to by Gustava) with relation to the criminality of her brother would be communicated to the mother; nor was there any direct proof that it had been communicated to her; or that he had knowledge that the mother's act in signing the note was induced to any extent by his remarks to the daughter. More than that, the case fails to show, by any competent evidence, that the mother was in fact induced to sign the note in suit by reason of any fear on her part that her son would be prosecuted for a violation of the criminal law in falsely and fraudulently representing himself to the custom-house officials as being the owner of the Tenafly property. So far, therefore, as the judgment against her executrix is concerned, we see no ground for interfering with it.

As to the judgment against appellant, individually—

For affirmance—BERGEN, BLACK, WHITE, TAYLOR, JJ. 4.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, MINTURN, KALISCH, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

As to the judgment against appellant as executrix—

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

For reversal—None.

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**MARIE S. VLADAR, RESPONDENT, v. LILLIAN KLOPMAN,
APPELLANT.**

Submitted March 27, 1916—Decided November 20, 1916.

1. The fundamental grounds upon which an action for malicious prosecution rests are that it was instituted against the plaintiff without reasonable or probable cause; and that the defendant was actuated by a malicious motive in making the charge. Unless the evidence in the case establishes the existence of both of these grounds, the plaintiff's suit must fail.
2. Where, in a suit for damages for malicious prosecution, the question whether or not the defendant had probable cause for instituting the prosecution against the plaintiff depends, in part at least, upon facts the existence of which are in dispute, it is the function of the jury to settle those facts, and, upon doing so, to determine on the whole case whether or not probable cause has been shown, such determination being based upon proper instructions from the trial court. But where the facts are not controverted, the question of probable cause is one of law, to be determined by the court, and its submission to the jury is improper.

On appeal from the Hudson Circuit Court.

For the appellant, *Weller & Lichtenstein*.

For the respondent, *J. Emil Walscheid*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The defendant, on July 10th, 1914, made a complaint before a justice of the peace, charging the plaintiff with stealing a gold and coral necklace, a gold and coral bracelet and a silver mesh bag. A hearing on the charge was had before the magistrate, and resulted in the plaintiff's discharge from custody. The plaintiff thereupon instituted an action for malicious prosecution against the defendant, adding thereto a count for slander. The trial of the action resulted in a verdict in the plaintiff's favor. From the judgment entered on that verdict the defendant now appeals.

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So far as the plaintiff's claim for damages is based upon the charge of slander, it may be disposed of by saying that no attempt was made at the trial to prove the speaking by the defendant of the slanderous words set out in the complaint, or of any other words of similar purport. This being so, the judgment, if valid, must rest solely upon the charge of malicious prosecution.

The fundamental grounds upon which an action for malicious prosecution rests are that it was instituted against the plaintiff without reasonable or probable cause; and that the defendant was actuated by a malicious motive in making the charge. Unless the evidence in the case establishes the existence of both of these grounds, the plaintiff's suit must fail.

The principal ground of appeal in the present case is that the uncontroverted proofs demonstrate that the defendant had reasonable and probable cause for charging the alleged larceny against the defendant, and that, therefore, the trial court should have directed a verdict in the defendant's favor when, at the close of the testimony, a motion for such direction was made.

There was proof submitted by the plaintiff which showed that the charge of larceny made against her was false. When she rested her case, therefore, this proof was sufficient to justify an inference of want of probable cause, and of malice. *Navarino v. Dudrap*, 66 N. J. L. 620; *Weisner v. Hanson*, 81 *Id.* 601.

To rebut the inference thus raised the defendant proved the following facts: On the morning of the 1st of July some chemicals which her son Willie, a boy about twelve years old, was compounding for the purpose of use in celebrating the Fourth of July, exploded with such force as to break the windows in, and dislodge the plaster from several of the rooms in the house. In order to have the debris cleared away as rapidly as possible, she directed her servant, Emma Gross, to try and get some woman to come there the next day and do this work. Emma thereupon went to the house of the plaintiff, with whom she had become acquainted

because of the fact that her (Emma's) sister Lena was board- ing there, and secured her services. The plaintiff was engaged in the work of cleaning the house for two days, and on the second day, about noon, a cousin of the defendant, a Mrs. Gerson, happened to go upstairs to the defendant's bedroom, and there observed the plaintiff standing in front of a bureau drawer which was open. She seemed greatly excited at Mrs. Gerson's appearance, and said to her, "Go out, lady, you must not come in here, you can't do any work here." Mrs. Gerson thereupon went downstairs and told the defendant what she had observed and advised her to lock up her belong- ings. The defendant had left in this room during the morning the three articles which she charged the plaintiff with having stolen. About two o'clock in the afternoon she went to the room for the purpose of getting the front door key out of the silver mesh bag, and found the bag missing. She then looked for the bracelet and the necklace, and they, too, had disappeared. The only persons who had been in the house during the day were the defendant, her cousin, Mrs. Gerson, the plaintiff, and the servant, Emma Gross. The latter had been in the defendant's employ for a year and a half, and never had done anything to cause her honesty to be ques- tioned. The defendant suspected the plaintiff of having taken these articles, but, as she had no satisfactory proof against her, merely told her that she would not require her services any longer. About a week after the articles had been discovered to be missing, Emma Gross brought her sister Lena to the defendant's house, and Lena then informed her that Mrs. Vladar, the plaintiff, a few days before, had told her that a lady had given her a bracelet and a necklace; that the bracelet had red stones in it, and the necklace had a red stone in it, and that some day she would show these articles to her. The missing bracelet was composed of gold and coral; the necklace had a coral pendant. The day after this information was received Mrs. Klopman, the defendant, went to the justice of the peace and made the complaint which is the basis of the present action.

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None of this testimony was attempted to be controverted, nor was the credibility of the witnesses who gave it sought to be impugned. The question, therefore, to be determined upon the motion to direct a verdict was whether these facts exhibited probable cause for believing the plaintiff to have been guilty of the theft of these articles. The trial court refused the motion upon the ground that the existence or non-existence of probable cause was a matter to be determined by the jury rather than by the court. In this holding we think there was error.

Where the question whether or not the defendant had probable cause for instituting the prosecution against the plaintiff depends, in part, at least, upon facts the existence of which are in dispute; it is the function of the jury to settle those facts, and, upon doing so, to determine on the whole case whether or not probable cause has been shown, such determination being based upon proper instructions submitted by the trial court. *Weisner v. Hanson*, *supra*; *Sunderbrand v. Shills*, 82 N. J. L. 700. But where the facts are not controverted the question of probable cause is one of law to be determined by the court, and its submission to the jury is improper. *Magowan v. Rickey*, 64 *Id.* 402; *McFadden v. Lane*, 71 *Id.* 624; *Hartdorn v. Webb Manufacturing Co.*, *ante* p. 262; *Lane v. Penna. R. R. Co.*, 78 N. J. L. 672; *Sunderbrand v. Shills*, *supra*.

As we have already stated, the facts which were the inducing cause of the defendant's complaint against the plaintiff were uncontroverted; they, therefore, presented a question of law for the determination of the trial court, viz., whether they exhibited probable cause for the defendant's action. We are clear that they did. The fact that the stolen articles were in the defendant's room on the morning of the second day of plaintiff's employment there, and had all disappeared before two o'clock in the afternoon; the fact that there were only four persons in the house during that time, including the defendant herself; that one of them was her cousin, Mrs. Gerson, and that another was her servant who had been in her employ for a year and a half, and whose

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honesty apparently was not open to suspicion, coupled with the fact that the plaintiff was an entire stranger to her, and had admitted to Lena Gross that she had in her possession articles of jewelry similar in description to those which had disappeared from her house, would, we think, have led any reasonable person to the belief that the latter was responsible for the disappearance of the stolen articles. This being so, it was the duty of the trial court to have directed a verdict in favor of the defendant.

It has been suggested that the rule first adverted to in this opinion, namely, that proof of the falsity of the charge justifies an inference of malice and of absence of probable cause for making the complaint, and that which permits a court, as a matter of law, to determine upon the undisputed facts in a case that probable cause exists, are out of harmony with each other, and that, therefore, one or the other must be unsound. We think not. The first rule merely creates a presumption which the defendant must overthrow in order to defeat the plaintiff's action. The second rule permits the absolute destruction of the presumption by uncontroverted proof of facts which demonstrate that the defendant had probable cause for making the charge laid against the plaintiff. It is true that, ordinarily, where a fact is proved which raises a presumption of liability on the part of the defendant, and other facts are put in evidence which tend to overthrow that presumption, a question is presented for the determination of the jury rather than of the court. But actions for malicious prosecution have always been differentiated by the courts, so far as this special feature of litigation is concerned. The rule which makes the existence or non-existence of probable cause, when the facts are not in dispute, a matter to be determined by the court, is probably the outgrowth of a public policy, the purpose of which was to encourage criminal prosecutions at the instance of private citizens, by making them certain that they might safely intervene to put in motion the machinery of the criminal law against apparent violators of its provisions, without being liable to be mulcted in damages, in case the prosecution should fail through lack

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of sufficient evidence or, perhaps, through the vagaries of the trial juries of earlier days. But, whatever may be its foundation, and whether it be logical or not, it has been too long in existence, and too universally followed, to be now subject to question.

For the reasons we have given, we conclude that the judgment under review must be reversed.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

HATTIE BLUMENFELD ET AL., APPELLANTS, v. HUDSON
AND MANHATTAN RAILROAD COMPANY, RESPONDENT.

.Argued June 21, 1916—Decided November 20, 1916.

In an action for damages against a railroad company for injuries sustained by the plaintiff because of the agent of the defendant closing the entrance doors of its train before the plaintiff was fully within the train, a charge by the trial court to the jury that "the duty of the defendant company through its agents and servants was and is to use reasonable care for the safety of its passengers upon its station platform and as they enter and leave their cars" is not, *per se*, erroneous; an objection to such charge does not raise the question whether or not the plaintiff was entitled to have the jury instructed that under the circumstances reasonable care was a high degree of care.

On appeal from the Hudson Circuit Court.

For the appellants, *Warren Dixon*.

For the respondent, *Collins & Corbin*.

The opinion of the court was delivered by

GARRISON, J. In an action for damages for personal injuries the defendant had the verdict and judgment.

The negligence charged was as follows: "Said plaintiff, Hattie Blumenfeld, proceeded to enter the door of said second train for the purpose of such transportation in the usual manner provided by said defendant, and while in the act of entering the same, and while partially through the said doorway, and partially upon said car, the guard and agent of said defendant suddenly closed, or caused to be closed, the said door, and in closing same struck the said door against the body of the said plaintiff, Hattie Blumenfeld, and caught and squeezed her in said doorway, and caused the said door to strike plaintiff, Hattie Blumenfeld, on the abdomen and side."

The plaintiffs appealed and the sole ground for reversal argued by their counsel is thus stated in his brief: "The court erred in charging the jury that 'the duty of the defendant company through its agents and servants, was and is to use reasonable care for the safety of its passengers upon its station platforms and as they enter and leave their cars.'"

There was no error in the legal proposition thus charged. Reasonable care is the proper description and designation of the duty that is imposed by law under certain conditions; it covers the entire range of such duty. Whether under the circumstances of a given case the degree of care that is reasonable be high or low it is imposed by law solely upon the ground that it is reasonable, *e. g.*, in the storing of dynamite near human habitations the care that is reasonable is of the very highest degree, while in the dumping of sand on a vacant lot the care that is reasonable is by comparison of the very lowest degree, and yet equally and in either case the care appropriate to the danger is imposed by law upon the ground that it is reasonable. *Gellatty v. Central Railroad Co.*, 86 N. J. L. 416.

The language, therefore, of the charge was a correct statement of the law. It does not follow that the plaintiff below may not have been entitled by a proper request to have the jury instructed that in the case before it reasonable care was

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a high degree of care. It may be that the denial of such a request would have been error.

That question, however, is not before us; there was no such denial and there was no such request. The objection was to what the court had charged, but this was not erroneous. In noting this objection counsel said: "I desire to note an objection to so much of your honor's charge as stated the duty of the defendant toward the plaintiff, in that your honor charged that the duty was to use reasonable care, whereas my contention is that if that be the duty, such duty is a high degree of care." This merely states the ground of objection to the charge, which has been considered and determined to be without merit.

The judgment of the Circuit Court is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 13.

For reversal—None.

THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT,
v. L. EDWARD HERRMANN, RESPONDENT.

Submitted July 10, 1916—Decided November 20, 1916.

The provision of the General Railroad law requiring that the secretary to the governor be carried free of charge is unconstitutional as to railroads operating under special charters previously granted and containing no such provision.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 526.



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For the appellant, *Vredenburg, Wall & Carey*.

For the respondent, *L. Edward Herrmann, pro se*, and *Herbert Boggs*, assistant attorney-general.

The opinion of the court was delivered by

GARRISON, J. The facts are stated in the opinion delivered in the court below and need not be repeated in detail. It suffices to say that the respondent was secretary to the governor, an office created by statute; that such office was not within the provision for free transportation of the charter of any of the appellant's constituent companies, but was within the provision of an amendment to the General Railroad law passed in 1907; and that the respondent held a certificate issued to him by the secretary of state in conformity to the amendment of 1914, which he tendered to the ticket collector of the appellant as entitling him to ride free of charge, which claim was denied by the conductor-collector and a fare demanded, which the respondent refused to pay, after which he was carried to his destination.

The main question is whether or not the certificate thus tendered lawfully entitled the respondent to ride without payment of a fare, and this in turn depends upon the constitutionality of the statute by the terms of which the appellant was required to carry the secretary of the governor free of charge.

In its legal aspects the case thus presented is identical with that of *Hoagland* passed upon by the Supreme Court in *Delaware, Lackawanna and Western Railroad Co. v. Public Utilities Board*, 85 N. J. L. 28. *Hoagland* was a member of the New Jersey state water-supply commission, the members of which were by a similar amendment to the General Railroad law required to be carried free of charge. The question was the constitutionality of this requirement. The Supreme Court held that inasmuch as the office in question was not within the charter contract of the railroad company the requirement of a later statute for the free carriage of the official in question was a taking of the property of the stockholders of the

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railroad company without compensation or due process of law, which was not justified as a valid exercise either of the police power or of the reserved rights of the legislature.

In this conclusion we concur and think that in the present case upon the same grounds the similar statutory requirement as to the free carriage of the secretary to the governor is likewise unconstitutional.

The court below reached a different conclusion, because it thought that the case of the secretary to the governor was distinguishable from that of a member of the state water-supply commission, in that "the good-will of such an official (secretary to the governor) might well be deemed advantageous to the railroads and his ill-will something to be deprecated," and this was deemed to bring the secretary to the governor within an exercise of the police power which the Supreme Court in the case cited had held could not be invoked to justify similar legislation as to a member of the state water-supply commission. If such characteristics of the office of secretary to the governor do not serve to distinguish that office from that of a member of the water-supply commission for the imposition of the police power, and if they afford no basis whatsoever for the exercise of that power, it is unnecessary to consider whether there might be other characteristics, not possessed by the respondent, that would justify such legislation or to decide whether under any circumstances such an exercise of the police power could be supported. In either event it would not concern the respondent how the questions thus mooted were decided, while, on the contrary, their decision in the present case would foreclose either the railroads or the large class of state officials affected by such decision, who have not had their day in court.

The first question therefore that we are called upon to determine in deciding the case before us is whether the characteristics of the office of the secretary to the governor bring such office within any valid exercise of the police power in respect to free transportation.

We think that this question must be answered in the negative, for the reason that the good-will or the ill-will of a per-

son is a matter that appertains to him purely as an individual and cannot in any sense be regarded as a characteristic of his office. It goes, therefore, without saying that a valid exercise of the police power could not be rested upon so unsubstantial a basis as the personal good-will or ill-will of the incumbent of a particular public office, the conduct of which must be presumed to be dictated by its incumbent's sense of public duty, and not by the degree of success with which his good-will has been secured or his ill-will averted.

This determination disposes of the present case without reference to the more fundamental question upon which the court below based its judgment.

It may be well, however, to point out that the language of the case cited upon which the court below based its judgment, occurred not in the decision of that case, but in a discussion of the early history of the legislation under review for the purpose of showing that the legal theory advanced to support it had no application to the case then *sub judice*. Views stated in this connection were necessarily *dicta* as to the soundness of which, for the reasons already stated, we express no opinion.

Upon the question whether in the present case there was an implied promise on the part of the respondent to pay a fare, if the certificate he tendered had not the validity that he supposed it had, we think that then such a promise was implied. The alternative view, viz., that the respondent designed to secure the service he demanded without making any payment therefor, if it turned out that he was wrong in supposing that the certificate he tendered entitled him to free carriage, is entirely untenable. Every legitimate presumption requires such an implied promise and no legal difficulty stands in its way. The action was therefore properly brought against the respondent.

Our conclusion on the main question is that the amendment to the General Railroad law requiring the secretary to the governor to be carried free of charge is unconstitutional, and that the judgment of the Supreme Court be reversed, to the end that the judgment of the First District Court of Jersey

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City be reversed and judgment final for the appellant entered for the amount shown by the stipulation to be due.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v. VIN-
CENZO BOVINO, PLAINTIFF IN ERROR.

Submitted July 10, 1916—Decided November 20, 1916.

1. Where a dying declaration is offered in evidence, the preliminary question of fact whether the declarant was under a sense of impending death is for the determination of the trial court; but when the declaration has been admitted, the questions of fact as to what the declarant said and what his mental and physical condition were at the time are for the jury.
2. A witness may be contradicted or impeached by testimony previously given by him before the grand jury. The case of *Imlay v. Rogers*, 7 N. J. L. 347, overruled.
3. Where a witness has volunteered testimony inimical to the party that called him, contrary statements by the witness made elsewhere may be shown, not for the purpose of impeaching the witness, but for the purpose of neutralizing the effect of his testimony.

On error to the Essex Oyer and Terminer.

For the plaintiff in error, *McDermitt & McDermitt*.

For the defendant in error, *Frederick F. Guild and Andrew Van Blarcom*.

The opinion of the court was delivered by

GARRISON, J. The plaintiff in error, Vincenzo Bovino, commonly known as Jimmy Bennett, was indicted for the

murder of Frank Miserentino, commonly known as Frank Baker, who, on the night of April 21st, 1914, was shot and killed in a dance hall in the city of Newark.

The affirmative defence of the accused was an alibi. At the trial, witnesses for the state testified that a few moments before his death, Baker, in answer to the question, "Who shot you?" said, "Jimmy Bennett," which was admitted in evidence as a dying declaration.

The argument of counsel in support of the contention that it was error to admit this declaration is partly addressed to the admissibility of the testimony and partly to its credibility or force. With respect to the admissibility of proof as to a dying declaration, the rule stated by this court in the case of *State v. Monich*, 74 N. J. L. 522, is as follows: "Where a dying declaration is offered in evidence, the preliminary question of fact whether the declarant was under a sense of impending death is for the determination of the trial court, and its finding, if supported by any legal evidence, is not reviewable by ordinary writ of error."

State v. Monich was here on a strict writ of error, the present case is under the one hundred and thirty-sixth section of the Criminal Procedure act as well. Whether the scope of review is thereby broadened need not be decided since the judicial action in the present case was correct under either method of review.

It is true that the statement of Baker, "I am going to die," standing alone was not conclusive proof that he was under a sense of impending death; it might mean that or it might be the statement of a mere truism. The statement, however, did not stand alone, its concomitant circumstances showed, or so a court might find, in what sense the words were used. These circumstances were the persistent refusal of Baker, as long as he had hopes of living, to say who shot him; the sending at midnight for the officer at Baker's request; the reception of the last rites of the church; the fact that he was vomiting blood, and that in the opinion of those about him he was dying; and the fact that a few moments after making the declaration he was dead.

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Not only was there legal testimony to support the finding that rendered the declaration of the deceased admissible, but such finding was amply justified by the weight of the testimony if this latter question be deemed to be before us. Having admitted the testimony as to what Baker said; the court properly left it to the jury to determine its truth and the weight to be accorded to it. This included not only the accuracy and truthfulness of the testimony as to what Baker said, but also Baker's bodily and mental condition at the time. This covers a number of assignments and specifications that were separately argued.

Counsel does not argue that the court left to the jury the question upon which the admissibility of the dying declaration depended, and for such an argument there would be no foundation in fact, hence the second point decided by *State v. Monich* is not involved. There was no error in the manner in which the offer of the dying declaration was dealt with by the trial court.

Anna Mae Gilling, a witness called by the state, having testified that she was in the dance hall at the time of the shooting, was asked to tell what happened. After answering this question in detail, she volunteered the statement, "but I did not see Jim Bennett in the hall at the time of the shooting." To enable the jury to determine what weight, if any, they should give to this irresponsible testimony, the clerk of the grand jury was sworn and testified that Anna Mae Gilling had testified before the grand jury that when she heard the shot she looked in that direction and saw Bennett standing at the saloon door, three or four feet away.

Counsel for plaintiff in error argues that upon grounds of public policy it was error to admit proof of testimony given before the grand jury, citing as an authority in this state *Imlay v. Rogers*, 7 N. J. L. 347. Upon a comprehensive examination of this question, Professor Wigmore reaches the conclusion that, "It is now universally conceded that a witness may be impeached in any subsequent trial, civil or criminal, by self-contradictory testimony given by him before the grand jury." *Wigm. Ev.* 2363.

In this conclusion of Professor Wigmore we concur, even as to the prophetic note in which he says, "The early doubt in New Jersey would to-day be repudiated. *Imlay v. Rogers*."

Imlay v. Rogers was a rule to show cause why a new trial should not be granted in a trespass case, tried in 1799, before Mr. Justice Kirkpatrick, who refused to admit a member of the grand jury to prove that a witness had sworn differently. On the question whether the rule should be made absolute, Chief Justice Kinsey and Justice Smith voted yes and Justices Kirkpatrick and Boudinot voted no. There was no opinion (the court being divided) and there is no way of knowing whether the justices who voted in the negative did so upon the proposition as to the grand jury or upon some other ground that properly enters into the question of granting a new trial. If the case is to be regarded as an authority for the proposition that the testimony of a witness before the grand jury cannot be put in evidence for purposes of contradiction and impeachment, it is against sound reasoning and the overwhelming weight of authority and must be regarded as definitely overruled.

The other ground of objection is that it was error "to permit the prosecutor to impeach his own witness." This is not an accurate statement of what the court permitted to be done, and as this matter was dealt with in the charge of Judge Martin with admirable clearness and precision, his language will be quoted as a correct statement of the situation and of the legal rule that was applied to it. He said, "The prosecutor called Mae Gilling, and she testified that she did not observe the defendant in the dance hall at the moment of the shooting. She made an oral statement under oath before the grand jury and a written statement that she saw the defendant at that time in the dance hall. The jury in this class of statements is permitted to consider as evidence only the testimony given here before it under oath. The statement elsewhere was not subject to cross-examination and the state cannot impeach its own witness. The statements made elsewhere were permitted to go in evidence merely for the purpose of tending to efface and neutralize the effect of the failure to

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testify of the witness under oath here that defendant was present at the shooting. The statements of the witness made elsewhere should be entirely disregarded as in any way tending to prove the truth of the fact which it asserts, which in this instance is that the defendant was present at the shooting. The jury may, however, if it believes the statements made elsewhere are worthy of that effect, conclude that they withdraw from the case the evidence of that witness which it tends to discredit just the same as if that evidence had never been introduced, but beyond this the jury cannot give it any effect whatsoever. In other words, the jury may permit it to wipe the slate clean so that there is no evidence of that witness upon that subject before the jury." The action of the trial court was therefore within the principle, although not within the precise facts, of *State v. D'Adame*, 84 N. J. L. 386.

There was no error in the rulings as to this witness.

The same is true as to the witnesses, Susan Brown Clark, Mary Weber, Anna Gurlter and Dr. Edward Staehlin.

We have examined the other assignments and specifications without finding any error or any matter justifying special mention.

Finding no trial error in the record before us, the judgment of the Essex Oyer is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

For reversal—None.

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JACOB BIRD, RESPONDENT, v. J. L. PRESCOTT COMPANY,
A CORPORATION, AND AMOS L. PRESCOTT AND
OTHERS; SURVIVING PARTNERS, APPELLANTS.

Submitted March 27, 1916—Decided November 20, 1916.

1. The plaintiff was injured while in the employ of a copartnership and was induced to forbear bringing suit by an offer, as he says, of a life job. At his demand this offer was put in writing. Nothing was said as to the wages to be paid or any other term of the employment. *Held*, that the writing was not sufficiently definite to make an enforceable contract.
2. A copartnership by which plaintiff was employed was succeeded by a corporation which took over all the assets and assumed certain of the liabilities, not including any liability to the plaintiff. The plaintiff continued at work, his pay was increased, and he was paid by the corporation. In 1913 his employment by the corporation was terminated; whether by his voluntary act or by his discharge was disputed; the plaintiff never tendered himself ready to work for the partnership after he began to work for the corporation. *Held*, that there was no proof of breach of contract by the copartnership.

On appeal from the Passaic County Circuit Court.

For the plaintiff-respondent, *Ward & McGinnis*.

For the defendants-appellants, *Michael Dunn*.

The opinion of the court was delivered by

SWAYZE, J. This action was at first brought against the corporate defendant alone. Subsequently by order of the court, the complaint was amended by joining the surviving partners. Whether the surviving partners were ever in fact brought into court is a question raised in the case and presented by the grounds of appeal. We pass it, since our view of the more important questions makes any expression of opinion on this subject unnecessary.

The plaintiff in 1905 was injured while in the employ of the copartnership, and threatened suit. To induce him to

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forbear, one of the partners, plaintiff testifies, offered to give him a life job. The plaintiff was not satisfied with the verbal assurance and demanded "a paper, a contract" as he says. A written paper was thereupon given him by which the copartnership agreed to give Bird steady and permanent work when he was able to return to same. Nothing was said either in the conversation or the written document as to the wages to be paid or any other term of the employment. In this respect the case is subject to the same difficulty that Chief Justice Beasley referred to in *Shaw v. Woodbury Glass Works*, 52 N. J. L. 7. The paper as well as the conversation on which the plaintiff relies, amount to no more than a friendly assurance of employment and are not sufficiently definite to make an enforceable contract. We might well stop here but another point is equally conclusive against the plaintiff. The copartnership of J. L. Prescott & Company was succeeded in February, 1910, by the corporation of J. L. Prescott Company, which took over all the assets and assumed certain of the liabilities mentioned in a schedule, which did not include any liability to the plaintiff. The plaintiff continued his work, apparently without interruption or change except that his pay was increased and he was paid by the corporation. Whether he had notice of the change does not appear. In 1911, one of the copartners died. In 1913 the employment of the plaintiff terminated; whether by his voluntary act or by his discharge was a disputed question. The trial judge did not put this question to the jury because he said there was no evidence that the plaintiff left any work which he was engaged in for the partnership, and the work he was doing for the corporation must be considered work which he was doing to minimize the damages. He held that there was no proof to go to the jury as to the liability of the corporation, but submitted to them the question of the liability of the partnership. In this respect he fell into error. He seems to have thought there had been a breach of the contract by the copartnership prior to the time when the relations between the plaintiff and the corporation were severed. There is no proof of such breach by the partners. The breach

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by the partners is averred to have been on April 26th, 1913; this averment is in the same terms as the averment of a breach by the corporation on the same day. It is therefore impossible to hold that the work done for the corporation was by way of minimizing damages, since there had thus far been no damages to minimize. The partners had never refused to give the plaintiff employment, nor is there any proof that they refused up to the bringing of the present action. The plaintiff never tendered himself ready to work for the partnership after he began to work for the corporation. What in fact happened was that he continued to work for the corporation as he had for the partnership, probably without any thought on either side of the change in the legal situation. The case is not one of novation since there was no agreement to substitute the liability of the corporation for the liability of the partnership. It seems rather a case of abandonment of the former contract necessarily implied from the conduct of both parties. If the plaintiff had a binding contract of service with the corporation, he had incapacitated himself from performance of his contract with the copartnership and the case would resemble that of mutual promises to marry where one party to the contract by marrying another commits a breach which discharges the other party from further liability (*Short v. Stone*, 8 Q. B. A. & E. 358; *Caines v. Smith*, 15 M. & W. 188), or the case of a contract to grant an estate where the proposed grantor disables himself by conveying to a third party (*Lovelock v. Franklyn*, 8 Q. B. A. & E. 371), or the case of a vendor of goods who disables himself from completing the sale by selling and delivering the goods to a third person. *Bowdell v. Parsons*, 10 East 359. In such a case the other party to the contract may treat it as at an end. *O'Neill v. Supreme Council*, 70 N. J. L. 410. If, however, the plaintiff did not have a binding contract with the corporation, and was free to carry out his alleged contract with the copartnership, he was bound to tender himself ready to work for the copartnership before he could put them in the wrong and bring suit for breach of contract. This he did not do. If he failed because both he and the partners assented to his

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working for the corporation, he is bound by this substitution of the new contract and the abandonment of the old. We are not now called upon to say whether the liability of the copartnership is consistent with the attempt of the plaintiff to hold the corporation, or whether the bringing of an action against the corporation was an election of remedies from which the plaintiff could not recede. In some of its aspects the case resembles *Coles v. McKenna*, 80 *Id.* 48. Nor are we called upon to say whether the proof of an abandonment of the contract with the copartnership and the substitution therefor of a contract with the corporation was so clear that the court should have taken the case from the jury. In some of its aspects the case resembles *Hobson v. Cowley*, 27 *L. J. Exch.* 205; *Scarf v. Jardine*, *L. R.*, 7 *App. Cas.* 345; 51 *L. J. Q. B.* 612; *Bond v. Walford*, *L. R.*, 32 *C. D.* 238; 55 *L. J. C.* 667; *Rushbrook v. Lawrence*, *L. R.*, 5 *Ch.* 3; 39 *L. J. C.* 93; and the cases of transfer of business from one insurance company to another, cited in *Leake Cont.* 685. Nor are we called on to express an opinion on the question whether the dissolution of a partnership by the death of a member affects the obligations of the partners upon continuing contracts of service. All that we decide is that the plaintiff has failed to show any breach by the copartners. The judgment is reversed, but without costs, and the record remitted to the end that there may be a *venire de novo*.

For affirmance—MINTURN, KALISCH, WHITE, WILLIAMS, JJ. 4.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, BLACK, HEPENHEIMER, TAYLOR, GARDNER, JJ. 11.

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Siegel v. Riverside Box & Lumber Co.

GEORGE SIEGEL, RESPONDENT, v. RIVERSIDE BOX AND
LUMBER COMPANY AND OTHERS, APPELLANTS.

Submitted July 10, 1916—Decided November 20, 1916.

1. In a suit for damages for refusal to register a transfer of stock, the rule of damages depends on the nature of the action. If the plaintiff claims special damages only and seeks to retain the stock, he is not allowed to recover the value and also to retain the title. If, however, he claims for a conversion of the stock, he may recover its value.
2. In an action to recover damages for refusal to register a transfer of stock, there was no proof of the value of the stock, and there was evidence that it had been originally issued without being in fact fully paid, that the corporation had not been prosperous and was conducted at a loss. *Held*, that it was error to direct a verdict for the par value of the stock with interest.

On appeal from the Essex County Circuit Court.

For the plaintiff-respondent, *Samuel I. Kessler* and *William L. Brunyate*.

For the defendants-appellants, *Charles B. Clancy*.

The opinion of the court was delivered by

SWAYZE, J. The plaintiff sues for the refusal to register a transfer of stock. On the face of the certificate he was entitled to have the transfer registered. The questions that may arise as to the equitable title to the stock or as to the right to have it canceled, are not important in the present action. Siegel was entitled to have the transfer registered on the company's books. It is settled that for a wrongful refusal to register a transfer, the transferee may maintain an action for damages against the corporation. It was because such an action, ordinarily, at least, affords an adequate remedy, that a *mandamus* was refused in *Galbraith v. Building Association*, 43 N. J. L. 389. The only question we need consider is the view taken by the trial judge of the measure of damages. He

directed a verdict for the par value of the stock with interest from the date of the refusal to transfer, without evidence as to its actual value. This was error. There was evidence in the case that the stock had been originally issued without being in fact fully paid; that the corporation had not been prosperous, and was conducted at a loss. The rule of damages in cases of this kind depends on the nature of the action. If the plaintiff claims special damages only, and seeks to retain the stock, it would obviously be wrong to allow him to recover the value of the stock and retain the title too. If, however, the plaintiff claims for a conversion of the stock, so that upon payment of a judgment in the action the title would pass to the judgment debtor (2 *Kent Com.* (12th ed., note 1) 388; *Singer Manufacturing Co. v. Skillman*, 52 N. J. L. 263; *Bauer v. Hess*, 76 *Id.* 257), he may recover its value. The rule to that effect is settled; the only difference between the courts of different jurisdictions is whether the value at the time of the alleged conversion should be taken, or the value at the time of trial, or the highest intermediate value. Cases are collected in 2 *Sedgw. Dam.* (8th ed.), § 519, and later cases in the note to *Dooley v. Gladiator Consol., &c., Co.*, 13 *Ann. Cas.* 297. By the weight of authority, recovery of the value at the time of the refusal to transfer is allowed. This rule has the high authority of the Supreme Court of Massachusetts. It was adopted by that court contrary to the individual view of Judge Putnam, who wrote the opinion in *Sargent v. Franklin Insurance Co.*, 8 *Pick.* 90, 100. It was followed by Chief Justice Shaw in *Hussey v. Manufacturers and Mechanics Bank*, 10 *Id.* 415, and has recently been followed in England. *In re Otto Kopje Diamond Mines* (1893), 1 *Ch.* 618. It has the merit of being in harmony with the ordinary rule of damages in the case of conversion of goods. While it makes it possible for the wrong-doer to profit by a subsequent rise of value, it prevents both parties from speculating thereon. We think it the proper rule. The difficulty in this case is that there was no proof of value. It may be that in some cases there would be a presumption in the absence of proof that the stock was worth par. *Hawkins v.*

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Mellis Pirie & Co. (Minn.), 149 N. W. Rep. 663. There can be no such presumption in a case like the present, where it seems probable that the stock has never been in fact fully paid and may still be liable to assessment—a liability to the holder rather than an asset. In the absence of proof of value the plaintiff was entitled to nominal damages only, and the judge was in error in directing a verdict for the par value with interest. For this error the judgment must be reversed and the record remitted, to the end that a *venire do novo* be awarded. No costs will be allowed in this court on appeal.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

ALEXANDER WEIR, RESPONDENT, v. EDWARD S. ALLEN,
APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

1. Although a party to a suit cannot be deprived of his statutory right to recoupment by the mere form of pleading as by declaring on the common counts, where the contract has been completely performed instead of declaring upon the express contract, yet where the implied contract declared on is in fact a different contract from that out of which the damages sought to be recouped arose, the claim of recoupment is excluded by the terms of the statute itself.
2. The provision of section 64 of the District Court act authorizing recoupment not only of damages sustained by reason of any cause of action arising out of the contract, but also of damages sustained by reason of any cause connected with the subject of the action, was not meant to apply to a case where pre-existing causes of action had become merged in the one on which the plaintiff sues.

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3. An account stated may be surcharged and falsified for fraud or mistake. *Vanderveer v. Statesir*, 39 N. J. L. 593, approved.
4. Where suit is brought on an account stated, and both parties concede that there was in fact an account stated, and the controversy is whether it resulted from a compromise, the real issue is not whether there were mistakes in the items, but whether the compromise was one enforceable by law. The necessary elements are the reality of the claim made, the good faith of the compromise, and the extinguishment of the pre-existing claim of the promisee.

On appeal from the Supreme Court.

For the plaintiff-respondent, *Burnett, Cornish & Sorg*.

For the defendant-appellant, *Edward S. Allen, pro se* (*George E. Clymer* on the brief).

The opinion of the court was delivered by

SWAYZE, J. The plaintiff's state of demand consisted of the common counts in *assumpsit* with a bill of particulars stating that he sought to recover the amount due on an account stated. The defendant, upon demand, specified as his defences that the sum of the account stated was not correct and that he did not owe the same; that the plaintiff did not fulfill the contract or work on which the account was stated on his part to be done and performed; that the work was not done in a good and workmanlike manner. He also sought to recoup damages. The trial judge struck out the recoupment because the damages did not arise out of the contract that was the subject of the action. In this he was right. The case, we think, is within the rule of *Bozarth v. Dudley*, 44 N. J. L. 304, and *Winter v. Schoenfeld*, 78 Id. 92. It is true that a party cannot be deprived of his statutory right to recoupment by the mere form of pleading, as by declaring on the common counts where the contract has been completely performed, instead of declaring upon the express contract; but where, as in the cases cited, the implied contract declared on is in fact a different contract from that out

of which the damages sought to be recouped arose, the claim of recoupment is excluded by the terms of the statute itself. In the higher courts the question has become unimportant since the enactment of section 12 of the supplement of 1912 to the Practice act. *Pamph. L.*, p. 379. In the District Courts the right of recoupment still is governed by section 64; the provision of section 68, making the practice of the Circuit Courts applicable, does not extend to the case since there is express provision of law providing otherwise, viz., the provision of section 64. The language of section 64 differs from the language of section 105 of the Practice act of 1903 (*Comp. Stat.*, p. 4084) and authorizes recoupment not only of damages sustained by reason of any cause of action arising out of the contract, but also of damages sustained by reason of any cause "connected with the subject of the action." This provision, broad as it is, could not, however, have been meant to apply to a case where pre-existing causes of action had become merged in the one on which the plaintiff sued. That is the present case. Disregarding the technicalities of pleading, the plaintiff's case is that all existing matters in controversy were settled and the balance due was agreed upon; for that balance he sues. It is a new contract requiring a new consideration to support it. The recoupment was properly stricken out.

The defendant, by his specifications of defences set up, and at the trial, sought to prove that there were errors in the account stated. The trial judge conceived the notion that he could not be allowed to make this proof because he had failed to deny in his specifications of defences that the account had been stated, and that he was thus precluded from attempting to deny it at the trial. This was an entire misconception of the legal situation. The defendant admitted the account stated but sought to surcharge and falsify. This he might do if he could show fraud or mistake. *Vanderveer v. Statesir*, 39 N. J. L. 593. He sought to show mistake. The trial judge clearly erred in the reason he gave for his ruling, but we think the error was harmless. The controversy was

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whether there had been an account stated resulting from a compromise. In such a case, where both parties concede that there was in fact an account stated, the real issue is not whether there were mistakes in the items going to make up the account. The very object of the compromise is to adjust such mistakes. The issue is whether the compromise resulting in the account stated was a compromise enforceable by law. The necessary elements are the reality of the claim made, the good faith of the compromise, and the extinguishment of the pre-existing claim of the promisee. "The extinguishment of the promisee's rights in the premises by force of the compromise is in such cases the benefit of the promisor which gives it the effect of a consideration." *Grandin v. Grandin*, 49 *Id.* 508, 510, approved by this court in *Bowers Dredging Co. v. Hess*, 71 *Id.* 327, and in *Trenton Street Railway Co. v. Lawlor*, 74 *N. J. Eq.* 828. In the present case Weir's claim amounted to \$460.80 after deducting \$334.10 due to Allen for board. Allen claimed a deduction of \$355.50, and this was assented to on behalf of the plaintiff and the balance ascertained as \$439.40, for which judgment was rendered. The evidence to this effect was uncontradicted; the judge sitting as a jury to try the facts gave credence to it, as indeed he could not do otherwise in the absence of contradiction. The legal effect was that Weir lost his right to claim the full amount of \$460.80 and Allen lost his right to defend as to the balance. Allen did not offer to prove any mutual mistake or that he had been misled in any way.

The judgment is affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPEHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

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Dunnewald v. Steers, Inc.

LENA DUNNEWALD, ADMINISTRATRIX OF THEODORE DUNNEWALD, DECEASED, PETITIONER AND APPELLANT, v. HENRY STEERS, INCORPORATED, DEFENDANT AND RESPONDENT.

Argued June 3, 1916—Decided November 20, 1916.

1. To warrant a recovery under section 2 of the Workmen's Compensation act (*Pamph. L. 1911, p. 134, as amended by Pamph. L. 1913, p. 302*) from an employer for the death of an employe, it must appear, among other things, that the employe's death was caused by (a) an accident, (b) arising out of, and (c) in the course of, his employment, and all these essential facts must be found by the trial judge, and must be contained in his written determination.
2. Upon the review of a judgment against the employer for the death of an employe under section 2 of the Workmen's Compensation act (*Pamph. L. 1911, p. 134, as amended by Pamph. L. 1913, p. 302*), when it appears that there has been no finding by the trial judge that the death was by accident, nor that it arose out of, and in the course of, his employment, the Supreme Court should send the case back for a new trial and proper determination of facts, either upon the evidence already taken, or upon such as the parties see fit to put in.

On appeal from the Supreme Court, whose opinion is reported in 85 N. J. L. 449.

For the appellant, *Samuel Besson*.

For the respondent, *Lindabury, Depue & Faulks* (*John W. Bishop, Jr., and Kinsley Twining* on the brief).

The opinion of the court was delivered by

TRENCHARD, J. This is a proceeding under section 2 of the Workmen's Compensation act (*Pamph. L. 1911, p. 134, as amended by Pamph. L. 1913, p. 302*) brought before a judge of the Hudson Common Pleas Court to recover compensation for the death of petitioner's husband.

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The learned trial judge rendered judgment for the petitioner and against the decedent's employer, and that judgment was reversed in the Supreme Court. 85 N. J. L. 449.

We are of the opinion that the judgment of the Supreme Court now here for review must be affirmed, but not for the reasons given in that court.

To warrant a judgment for the petitioner it must appear, among other things, that the employe's death was caused by (a) an accident, (b) arising out of, and (c) in the course of, his employment (*Bryant v. Fissel*, 84 N. J. L. 72), and all these essential facts must be found by the trial judge, and must be contained in his written determination, because paragraph 20 of section 2 (*Pamph. L. 1913, p. 308*) requires that the determination of the trial judge shall be filed in writing, and shall contain a statement of the facts as determined by the judge. The proceeding in question is not one according to the course of the common law. The judge acts, or professes to act, not upon common law principles, but rather, as directed by the statute (section 2, paragraph 20), proceeds, at the time fixed for hearing, to hear such witnesses as may be presented by each party, and in a *summary manner* decides the merits of the controversy.

Now, in the present case, there was no finding by the judge that the death of the decedent was by accident, nor that it arose out of, and in the course of, his employment. This the Supreme Court recognized, but, nevertheless, proceeded to examine the evidence returned for the purpose of determining whether it would have been possible for the trial judge to find therefrom the facts necessary to support the judgment. From such examination the Supreme Court concluded that while the trial judge might properly have inferred that decedent came to his death by accident, and, possibly, that it arose in the course of his employment, yet the evidence would not have justified a finding that the accident arose out of the employment.

With the soundness of that conclusion of the Supreme Court we are not now concerned, and respecting it we express

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no opinion. We think the Supreme Court should not have entered upon that investigation. When it appeared that there had been no finding respecting these essential facts by the trial judge, the Supreme Court should have sent the case back for a new trial and proper determination of facts, either upon the present evidence or upon such as the parties see fit to put in. The reason why such a course should have been adopted appears from a consideration of the proper function of the Supreme Court upon review of such a proceeding. The right to review is limited to questions of law. *Bannister Company v. Kriger*, 84 N. J. L. 30. The evidence in the trial court which was sent up is no substitute for the finding of facts as required by the statute. Of course, such evidence is properly sent up if a finding of fact is challenged as without any evidence to support it. But the evidence alone, without the finding of facts, is not sufficient for the purpose of review, because the reviewing court cannot know what credit the trial judge gave to the several witnesses, and which of two possible but conflicting inferences he drew from the testimony. *Long v. Bergen County Common Pleas*, *Id.* 117; *New York Shipbuilding Co. v. Buchanan*, *Id.* 543. Those are functions of the trial judge, and his findings of facts, if there be legal evidence to warrant them, are accepted by the reviewing court. *Bryant v. Fissel*, *supra*.

The judgment of the Supreme Court reversing the judgment of the Common Pleas Court will be affirmed, to the end that there may be a new trial and proper determination of facts, either upon the present evidence or upon such as the parties see fit to put in.

No costs will be allowed in this court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 12.

For reversal—None.

Lange v. N. Y., S. & W. R. R. Co.89 N. J. L.

RACHEL ANN LANGE ET AL., EXECUTORS, &c., OF JURGEN P. LANGE, DECEASED, PLAINTIFFS AND APPELLANTS,
v. NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, DEFENDANT AND RESPONDENT.

Argued June 22, 1916—Decided November 20, 1916.

1. One who, while riding in the private automobile of another, is injured by the negligence of a third party, may recover against the latter, notwithstanding that the negligence of the driver of the automobile contributes to the injury, where the person injured is without fault and had no authority over the driver.
2. If one injured by the negligence of a third party had no authority over the driver with whom he was riding, and was not negligent himself, and the relation of master and servant, or principal and agent, or mutual responsibility in a common enterprise did not exist, then the negligence of the driver cannot be imputed to him.
3. In an action to recover for the death of a person, while riding with another, through the negligence of a third party, it is not error justifying reversal for the trial judge to charge incidentally that "if decedent had no authority over the driver, and was not negligent himself, and the relation of master and servant, or principal and agent, or mutual responsibility in a common enterprise did not exist, then the negligence of the driver is not imputable to the decedent," even though there was no evidence of such relation, it appearing that the judge charged in effect that there was no such relation, and limited a finding of contributory negligence, if any, to want of reasonable care upon the part of the decedent himself.
4. If counsel conceives that a pertinent legal principle has been omitted by the judge in his charge, he should request the desired instruction.

On appeal from the Supreme Court.

For the appellants, *Warren Dixon* (*James F. Donnelly*, of the New York bar, on the brief).

For the respondent, *Collins & Corbin* (*Gilbert Collins* and *George S. Hobart* on the brief).

The opinion of the court was delivered by

TRENCHARD, J. Jurgen P. Lange was killed at a grade crossing of the defendant's railroad as a result of a collision

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between the defendant's train and the automobile in which Lange was riding. His executors brought this action to recover for his death. The evidence at the trial at the Passaic Circuit showed that the automobile in which the decedent was riding was owned and was being driven by the decedent's son who had invited his father to ride with him. The jury found a verdict in favor of the defendant company and the plaintiffs appeal from the consequent judgment.

The only ground of appeal argued is that the trial judge erred in his charge.

The exception to the charge was as follows:

"I desire to except to your honor's charge in which you stated the rule of the relationship existing with the boy Joseph, either of master and servant, or agent or engaged in a common enterprise. I think as a matter of law none of them existed."

We have not stopped to consider whether this exception presented to the trial judge with sufficient clearness the point of which counsel were complaining. We have examined the charge and find no error justifying reversal.

Incidentally upon the topic which seems to be in question the judge charged:

"One who while riding in the private conveyance of another is injured by the negligence of a third party, may recover against the latter, notwithstanding that the negligence of the driver of the conveyance in driving his auto contributed to the injury, where the person injured is without fault and has no authority over the driver."

He further charged:

"So you see, gentlemen, if the deceased, Mr. Lange, had no authority over the driver, and was not negligent himself, and the relation of master and servant or principal and agent or mutual responsibility in a common enterprise did not exist, then it does not make any difference how negligent the boy was, and that negligence could not be imputed to the father."

Both of these instructions were correct in law. *Mittels-*

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dorfer v. West Jersey and Seashore Railroad Co., 77 N. J. L. 698.

But counsel for the plaintiffs argue that it was erroneous to so charge because, as they contend, there was no evidence that the relation of master and servant or principal and agent or mutual responsibility in a common enterprise existed between the driver and the decedent. We should hesitate before saying as a matter of law that there was no evidence from which a legitimate inference of such relation could be drawn. But we think a sufficient answer is that, if such charge was erroneous at all, no substantial right of the plaintiffs was injuriously affected thereby. It seems that the judge charged in effect that there was no such relation, and refrained from submitting that question to the jury. After referring to the evidence that the son owned the car, that he drove it, that he chose the route they took, the judge charged that "the fact that the deceased was a guest did not relieve him from exercising ordinary care." He then referred to the evidence tending to show want of reasonable care upon the part of the decedent himself upon which his contributory negligence depended. In the last analysis (leaving out of account the question of damages) the trial judge left to the jury two questions, and only two—*first*, whether the defendant exercised the care which the law cast upon it; *secondly*, whether negligence of the decedent himself contributed to the injury. Manifestly the jury was not misled.

The plaintiffs also contend that the trial judge should have instructed the jury as to when in law the relation of master and servant, principal and agent, and mutual responsibility in a common enterprise, would arise.

But if counsel conceived that a pertinent proposition of law had been omitted they should have requested the desired instruction (*Newark Passenger Railway Co. v. Block*, 55 N. J. L. 605), and that they did not do. They submitted no requests.

The judgment below will be affirmed, with costs.

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For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

KATHERINE SCHAUS, PLAINTIFF AND APPELLANT, v.
HORATIO C. HENRY, ADMINISTRATOR, &c., DEFEND-
ANT AND RESPONDENT.

Submitted July 10, 1916—Decided November 20, 1916.

1. Where, after a note has been delivered and the contract thereby created has been fully consummated, a third party writes on the note over his signature the following irregular endorsement: "This note to be paid out of my estate after my death," that endorsement constitutes a promise to pay the debt of another, and requires a new consideration to support it.
2. The defendant's written promise to pay the debt of another has no legal validity, if there be no evidence of consideration outside of the promise itself.

On appeal from the Camden Circuit Court.

For the appellant, *Stackhouse & Kramer*.

For the respondent, *William P. Walsh*.

The opinion of the court was delivered by

TRENCHARD, J. One George W. Henry, on August 25th, 1909, gave to Katherine Schaus, the plaintiff below, a promissory note dated August 25th, 1909, for \$1,000, payable five years after date, to the order of the plaintiff.

George W. Henry, the maker of the note, died July 2d, 1912, intestate, unmarried and without issue.

On the 6th day of July, 1912, James S. Henry, the father of George W. Henry, made the following endorsement on the note: "July 6th, 1912. This note to be paid out of my estate after my death with interest. James S. Henry."

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Before the maturity of the note James S. Henry died and suit was instituted in the Camden County Circuit Court by the plaintiff against the administrator of the estate of James S. Henry, pursuant to a notice that the claim was disputed.

At the trial the foregoing facts were stipulated and the trial judge, sitting without a jury, rendered a judgment of nonsuit against the plaintiff, and this appeal is to determine the propriety of that judgment.

We are of the opinion that the judgment of nonsuit must be affirmed.

The note itself, before the endorsement was added, was a negotiable instrument, importing consideration, and a valid obligation of the maker. The endorsement, however, stands on a different footing. It was an irregular endorsement. It was made after the delivery of the note—after the contract creating the debt was fully consummated. It was, in fact, a promise to pay the debt of another, and required a new consideration to support it. *Hayden v. Weldon*, 43 N. J. L. 128.

Now there was no evidence before the trial judge of a new consideration. The engagement of the defendant's intestate was entirely gratuitous. There is no evidence of any benefit to him, or detriment to the plaintiff, or to any other person. The argument that by reason of his engagement the defendant's intestate was permitted to benefit from the estate of his son (the maker of the note) has no foundation of fact to support it. There was no evidence that the maker of the note left any estate. In short, we have nothing but the written promise of the defendant's intestate to pay the debt of another, and that has no legal validity since there is no evidence of consideration outside of the promise itself. *Pike v. Van Riper*, 57 N. J. L. 290.

The judgment below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 14.

For reversal—None.

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Steel v. Freeholders of Passaic.

ALBERT STEEL, PLAINTIFF AND RESPONDENT, v. THE
BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY
OF PASSAIC ET AL., DEFENDANTS AND APPELLANTS.

Submitted July 10, 1916—Decided November 20, 1916.

1. The Civil Service act (*Comp. Stat.*, p. 3795) did not take effect in the county of Passaic until after the expiration of forty-five days from November 5th, 1912, the day on which the election was held at which it was adopted by the voters of the municipality.
2. The cardinal principle for the construction of statutes is that they are to be so construed that, if possible, full effect shall be given to all parts of the statute.
3. A statute ought upon the whole to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.

On appeal from the Supreme Court.

For the appellants, *Frederick W. Van Blarcom*.

For the respondent, *Hunziker & Randall*.

The opinion of the court was delivered by

TRENCHARD, J. The plaintiff below, some time before January 1st, 1908, was employed by the board of chosen freeholders of the county of Passaic as keeper in the county jail. He continued in that employment until December 16th, 1912, when, pursuant to an order of the sheriff dismissing him from such employment, he discontinued the same until he was reinstated by the sheriff on March 29th, 1913, pursuant to an order of the civil service commission.

By this suit, brought against the board of chosen freeholders and the sheriff, the plaintiff sought to recover his salary for the period between his removal and reinstatement.

The trial judge, sitting without a jury, at the Passaic Circuit, rendered judgment of nonsuit as to the sheriff, and a judgment in favor of the plaintiff and against the board of

freeholders for the amount of the plaintiff's claim. The board of freeholders appeals.

We are of the opinion that the appeal is well taken.

The learned trial judge considered that the plaintiff was protected from removal by the Civil Service act. *Comp. Stat.*, p. 3795.

But that depends upon whether or not that act had taken effect in Passaic county at the time the plaintiff was removed.

It is conceded that, leaving out of account the Civil Service act and kindred legislation, the sheriff had been invested by the legislature with the absolute power of removal of a keeper of the county jail. It is also conceded that such power subsisted unless the sheriff had been deprived of it by the taking effect in Passaic county of the Civil Service act. *Sullivan v. McOsker*, 84 N. J. L. 380.

Now, although the Civil Service act was adopted by the legal voters of the county of Passaic at the general election held on November 5th, 1912, yet we think that by its terms it did not become operative in the county until forty-five days thereafter, that is until December 20th, 1912, and that was four days after the removal of the plaintiff. And in saying this we are dealing with the act as it stood in December, 1912, and without reference to the supplement of March 2d, 1915. *Pamph. L.*, p. 49.

The act provides: "Section 1. * * * After the expiration of forty-five days from the time of its adoption by any municipality of this state as hereinafter provided, appointments to and promotions in the civil service of such municipality shall be made only according to merit and fitness, to be ascertained as far as practicable by examinations, which as far as practicable shall be competitive; and after the expiration of said * * * forty-five days * * * no person shall be appointed, transferred, reinstated, promoted, reduced or dismissed as an officer, clerk, employe, or laborer in the civil service under the government of * * * such municipality thereof as shall adopt the provisions of this act as hereinafter provided, in any manner or by any means other than those prescribed in this act." *Comp. Stat.*, p. 3795, ¶ 57.

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The effect of that section was to postpone the taking effect of the act until forty-five days after its adoption by the municipality. On this subject the Supreme Court in *Ziegler v. Burk*, 83 N. J. L. 207, said: "In the case before us, it appears that the Civil Service act was adopted by the city of Trenton at the general election held November 7th, 1911; consequently it became operative in the city of Trenton forty-five days thereafter (section 1); that is, on the 22d day of December of that year."

The Civil Service act not becoming operative in the county of Passaic until the 20th day of December, 1912, the sheriff of the county had full power and authority to discharge the plaintiff at any time before that date with or without cause; and having such authority, such discharge was not unlawful.

The court below, following the contention of the plaintiff, we think erroneously held that section 2 of the Civil Service act (*Comp. Stat.*, p. 3795, ¶ 58) controlled the time of the taking effect of the act to the exclusion of the specific provisions of section 1.

Section 2 of the act provides that "All officers, clerks and employes now in the employment of * * * any municipality adopting this act * * * shall continue to hold their offices or employments, and shall not be removed therefrom except in accordance with the provisions of section twenty-four hereof."

If the contention that the word "now" in section 2 refers to the time of the adoption of the act by any municipality is correct, then the provision of section 1 that "After the expiration of * * * forty-five days * * * no person shall be * * * reduced or dismissed as an officer, clerk, employe or laborer * * * in any manner or by any means other than those prescribed in this act," is rendered valueless and without meaning.

To adopt that contention would be clearly in violation of the well-settled rule for the construction of statutes.

The cardinal principle for the construction of statutes is

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that they are to be so construed that if possible full effect shall be given to all parts of the statute. *State, Morris and Essex Railroad Co. v. Commissioners of Railroad Taxation*, 37 N. J. L. 228.

The statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. *James v. DuBois*, 16 N. J. L. 286.

To give the word "now" in section 2 its generally accepted meaning, which is "immediately" or "at the time of the approval of the act by the governor," would be repugnant to the whole intent of the act, which is to make the act applicable only after its adoption by a municipality; so that the word "now" cannot be used in its generally accepted sense, and we must look for some other meaning to be given to the word which will, if possible, give full force and effect to every other provision of the act.

Now section 31 of the act (*Comp. Stat.*, p. 3807, ¶ 87) provides that after the act has been submitted to the voters of any municipality and the vote had thereon, "a canvass and return of the votes upon the question of the acceptance of this act shall be made by the election officers in the same way and manner as for officers voted at such election, and *if a majority of the votes cast for and against the acceptance of this act shall be found to be in favor of its acceptance, it shall then, but not otherwise, become operative* in such municipality."

This provision brings us to the operation of the election machinery of this state. The law provides that at the close of the election the members of the district boards of registry and election shall count the votes (*Comp. Stat.*, p. 2107, § 89) and shall make a statement of the result (*Pamph. L.* 1912, p. 637), and shall file such statement with the county clerk within *two days* after the election (*Pamph. L.* 1911, p. 723); that the county board of elections, as the county board of canvassers, shall meet *on Monday following the election*, at twelve o'clock noon (*Comp. Stat.*, p. 2111, § 103), but

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that it may *adjourn to the following day*, and may then *adjourn for a period not exceeding three days* (*Comp. Stat.*, p. 2111, § 105); that from the statements filed by the district boards of registry and election with the county clerk, the county board of canvassers shall proceed to make a statement of the votes cast at the election (*Comp. Stat.*, p. 2112, § 108); and shall certify to the election and file a certificate of election together with the statement with the county clerk (*Comp. Stat.*, p. 2113, § 111); that the county clerk shall then make out a certificate of election and send the same without delay to each person elected. *Comp. Stat.*, p. 2114, § 114.

From this it appears that an official determination of the result of the election in a county could not be had until six (and it might be ten) days after the day on which the election is held, and it is upon this official determination that the operation of the Civil Service act, in a municipality adopting it, depends; section 31 of the act (*Comp. Stat.*, p. 3807, § 87) providing that if upon such canvass a majority of the votes cast "*shall be found to be in favor of its acceptance it shall then, but not otherwise, become operative* in such municipality."

Briefly put, the word "now" in section 2 of the act cannot mean the day the act was approved, because by its own provisions the act must first be adopted by a municipality before it becomes effective therein. Neither can the word "now" be construed to mean the day the election at which the act was adopted by a municipality was held, because of the provisions of section 31 of the act; it therefore necessarily follows that the word "now" refers to the time fixed by section 1 of the act, which is forty-five days after the day on which the election was held.

This being so, and the Civil Service act not being in force in Passaic county at the time of the dismissal of the plaintiff, his dismissal was legal and the defendant is not liable.

The judgment of the court below will be reversed and a new trial awarded.

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For affirmance—KALISCH, J. 1.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 13.

PERTH AMBOY CITY MARKET, A CORPORATION, PROSECUTOR-APPELLANT, v. SAMUEL BAUM, DEFENDANT-RESPONDENT.

Submitted July 10, 1916—Decided November 20, 1916.

1. On *certiorari* of a District Court judgment after trial where there is a dispute as to what occurred in reference to the trial and there are contradictory certificates of the trial judge, his final certificate in response to a rule of court is taken as truly stating the facts.
2. A District Court has no power to adjourn indefinitely a trial partly finished, and afterward to award judgment without notice to the party against whom it is to be rendered or opportunity to conclude the trial.

On appeal from the Supreme Court.

For the appellant, *Joseph E. Stricker*.

For the respondent, *Thomas Brown*.

The opinion of the court was delivered by

PARKER, J. The Supreme Court on *certiorari* affirmed the judgment of the District Court of Perth Amboy, and this adjudication is brought here for review. The ground of attack on the judgment of the District Court is that said court lost jurisdiction of the case by an illegal and irregular adjournment.

There is some difficulty in ascertaining from the record just what took place in the District Court. The defendant, who is the present appellant and the prosecutor in the Supreme Court, was regularly served with process, appeared, and the case went to trial without a jury, on July 2d, 1915. The docket shows that certain witnesses were sworn for plaintiff; and then follow these entries:

"(Adjourned to allow defendant to locate Mr. Shostak.)

"September 7th, 1915, judgment was rendered for plaintiff for the sum of \$46.43 damages and \$5.92 costs of suit."

Defendant having taken its *certiorari* and assigned as reasons the indefinite adjournment and rendition of judgment without notice to defendant, plaintiff traversed the return, alleging that the "adjournment" was really a reservation of decision by the District Court with permission to defendant to produce the witness if this should be done before judgment rendered. The Supreme Court ruled the judge of the District Court to certify whether or not at the conclusion of the trial of said cause * * * on the 2d day of July, 1915, the decision of the judge of said court was reserved, and if so to certify to the Supreme Court the conditions upon which said decision was reserved, if any, and the manner in which judgment was entered thereon.

The judge in response to this certified, in effect, that there had been no adjournment, that the trial had been concluded and decision simply reserved with the privilege to defendant of producing Mr. Shostak at any time before entry of judgment, and in that case the trial would be opened to let in his testimony.

A few days after this certificate, at the instance of defendant prosecutor, the judge made an affidavit stating that his memory was at fault when he made the certificate and that he had relied largely on statements of the plaintiff's attorney; that on further investigation he found that he did not hear all the testimony or reserve decision, but postponed the trial to enable the plaintiff (and not the defendant) to produce Shostak; that defendant's side was not heard or to be heard until Shostak was produced by the plaintiff.

Upon this affidavit being presented to a justice of the Supreme Court, there was a rule on the original plaintiff to show cause why the amended return should not be struck from the files, with leave to take depositions. These were taken and the judge was then ruled to make a "positive and certain return." His final return, so far as concerns the present inquiry, is as follows:

July 2d, 1915. This cause was called at ten o'clock in the forenoon. Plaintiff appeared by Thomas Brown (who moved to amend title of case). Defendant appeared by John A. Delaney for Joseph E. Stricker. Original books of entry produced. Samuel Baum, Dominick Terrola, Dora Baum and Ida Sacarny sworn for plaintiff.

(Adjourned to allow defendant to locate a Mr. Shostak.)

September 7th, 1915. Judgment was rendered for plaintiff for the sum of forty-six dollars and forty-three cents damages (\$46.43) and five dollars and ninety-two cents (\$5.92) costs of suit.

(Here follows a certificate of the clerk that the foregoing is a true copy of the records, &c.)

AMENDED RETURN.

On the 7th day of September, 1915, Thomas Brown, attorney for the plaintiff, appeared in the District Court, in the city of Perth Amboy, and moved for judgment for the plaintiff, which was granted.

(Signature of the judge.)

The net result of all this is, that the Supreme Court had the final certificate of the judge in response to rule of court which must be taken as truly stating what occurred with regard to the trial. *Searing v. Lum*, 5 N. J. L. 683; *Drake v. Camp*, 45 Id. 293. From this certificate it appears that there was an indefinite adjournment of the trial, and afterwards, without notice to the defendant, who had taken no testimony, a judgment for plaintiff on the testimony of plaintiff's witnesses alone.

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The well-established rule in justices' courts is that there must be a definite adjournment or the court loses jurisdiction of the cause. *Allen v. Summit Board of Health*, 46 N. J. L. 99, and cases cited, overruling *Darlings v. Corey*, 1 *Id.* 200. The same rule applies to District Courts, except that after the hearing is terminated, the court may reserve decision for a reasonable time. *Prudential Insurance Co. v. Taylor*, 59 *Id.* 352, 356. The authority in the statute is to adjourn the trial to such time as may be fixed by the court (*Comp. Stat.*, p. 1998, § 148), a provision which relates "to the trial of the cause and to such other proceedings therein as require the attendance of parties in order that their interests may be properly conserved." *Prudential Insurance Co. v. Taylor*, *ubi supra*. The provision of section 148 permitting the judge to mark a case "not moved," is not applicable on the facts of this case. It may be that inasmuch as the adjournment appears to have been on defendant's application, the cause could have been reinstated on due notice to defendant to proceed with the trial. This it is not necessary to decide, for no notice was given and judgment was ordered on the *ex parte* application of plaintiff. The District Court was without jurisdiction to award such judgment.

It follows that the judgment of the Supreme Court and that of the District Court are reversed, with costs.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 11.

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**SAVERIO RIZZOLO, TRADING, &c., PLAINTIFF-APPELLANT,
v. CHARLES W. POYSHER, BUILDER, AND ALFRED
STAHL, OWNER, RESPONDENTS-DEFENDANTS.**

Argued July 6, 1916—Decided November 20, 1916.

1. In a mechanics' lien suit the whole claim is not vitiated because of one or more items improperly set out in the bill of particulars, if the good and bad items are not inseparably blended.
2. A general statement in the bill of particulars of a mechanics' lien claim that the work was done by contract at a price mentioned is sufficient.
3. Where an architect wrongfully refuses to issue certificates of completion of work, it is not necessary to show that the owner participated in the wrongful refusal, in order to sustain an allegation of fraud, based upon such refusal.

This was a mechanics' lien suit by the principal contractor which after a trial in the Circuit Court resulted in a general judgment against the "builder" and special judgment against the "owner." On appeal to the Supreme Court the general judgment was sustained, and this phase of the case is not appealed. The special judgment against Stahl as "owner" was reversed for reasons set forth in the following *per curiam* opinion of the Supreme Court:

"We find no error which warrants reversal of the judgment against the builder. The case is different with the judgment against the owner. The lien claim contained a bill of particulars as follows:

"Final payment under contract dated Oct. 29th, 1912.....		\$1,500.00
"Extra work performed and materials furnished at the request of the owner and architect as follows:		
"Change from wood beams to reinforced concrete ceiling		80.00
"Concrete between beams and booth floor in place of wood.....		50.00

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"One extra door covered with metal in booth completed	\$15.00
"One double iron trap door above iron ladder	8.00
"Six brass shore electric chandelier sets..	72.00
"One ½ shell with brass frame chandelier	10.00
"Extra work cellar drain from rear yard to cellar	68.00
"To lower the two rear exits excavating, retaining wall as per submitted estimate	253.00

"Total amount claimed..... \$2,056.00

"At the close of the plaintiff's case a motion was made to nonsuit as against the owner because of the insufficiency of the bill of particulars. Thereupon on application of the plaintiff, the circuit judge allowed amendments specifying that the items of \$80, \$50, \$15, \$8, \$68 and \$253 were furnished by agreement in the months of February or March, 1913. No amendment was made as to the items of \$1,500, \$72 or \$10. Clearly the item of \$1,500 is not set forth as the statute requires. Section 16, IV. (*Comp. Stat.*, p. 3304), requires:

" 'A bill of particulars exhibiting the amount and kind of labor performed and of materials furnished, and the price at which and times when the same was performed and furnished, and giving credit for all the payments made thereupon and deductions that ought to be made therefrom, and exhibiting the balance justly due to such claimant.'

"When the work and materials are furnished by contract, the particulars need not be stated 'further than by stating, generally, that certain work therein stated was done by contract at a price mentioned.'

"The present bill of particulars does not set forth the amount and kind of labor performed and materials furnished; it does not state prices and times, as to the \$1,500, even after amendment; it does not give credit for all payments made;

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and if it can be held to state that the work was done by contract, it does not mention the price. The plaintiff does not defend this method of setting forth the particulars, but argues that the question was not properly raised by motion to nonsuit, since the lien might be good as to the other items as to which amendments were allowed. The difficulty with this argument is that the bill of particulars is a single bill, and if it fails to comply with the statute, it cannot support a lien as to a portion only. The owner was entitled to a nonsuit, and as far as the judgment is special against the property, it must be reversed. Whether or not an amendment is still permissible is a question not presented by this record. The reversal is without costs."

For the appellant, *Samuel F. Leber*.

For the respondent, *Hugo Woerner*.

The opinion of the court was delivered by

PARKER, J. It is not quite clear whether the Supreme Court held that all the items in the bill of particulars were defective after amendment, or, conceding that some of these items were good, held that the whole bill was vitiated by one bad item. We conclude on our examination of the case that some of the items are sufficiently stated, and that so far as they are so stated the lien can be supported.

Four things are required to be contained in a valid lien claim, under section 16 of the Mechanics' Lien act—

1. A description of the building and curtilage.
2. The name of the owner (at the time of filing the lien). *Edwards v. Derrickson*, 28 N. J. L. 39; 29 *Id.* 468.
3. The name of the person that contracted the debt ("builder"). These requirements were all met in the lien claim under consideration as amended.
4. A bill of particulars exhibiting (a) the amount and kind of labor performed and materials furnished; (b) the price at which, and (c) the times when the same were performed and furnished; (d) giving credit for all the payments

made thereupon; (e) exhibiting the balance justly due to the claimant.

But where the work or materials, or both, are furnished by contract, the statute provides that the statement need not state the particulars of such labor or materials further than by stating, generally, that certain work therein stated was done by contract at a price mentioned.

The claim is to be verified by oath of the claimant in a form specified in the statute; and if the claim be not filed in the manner or within the time prescribed, or if the bill of particulars shall contain any willful or fraudulent misstatement of the matters directed to be inserted therein, the lien fails.

There is evidence to show that this lien claim was filed within the legal time. It was also filed in the manner prescribed, viz., in the county clerk's office, made up in the form and with the verification required by the statute. The clause "in the manner * * * aforesaid" cannot refer to the accuracy of the bill of particulars, item by item, because that is covered by a special clause, whereby the claim is invalidated for willful or fraudulent misstatement. No other defect in the bill of particulars is mentioned in the act. Our cases have held, at a time when the act was strictly construed as an innovation on the common law (*Ayres v. Revere*, 25 N. J. L. 474; *Associates v. Davison*, 29 *Id.* 415), that if the bill of particulars as a whole failed to measure up to the requirements the lien failed. *Associates v. Davison*, *supra*. But even at that period it was not said that an illegal item would vitiate the whole bill. On the contrary, the stress was laid on the fact that not a single item was supportable. Page 422. In *Edwards v. Derrickson*, *supra*, the claim contained an item for construction of a flume, and it was argued that this was not lienable and made the claim incompetent as evidence on the trial. Mr. Justice Van Dyke, writing for the Supreme Court, said (on p. 42): "If the charge for the flume were in the claim wrongly, it could not impair it as legal evidence to prove the other matters contained in it, and it was therefore properly received." The language of the act at that time was identical with that of the present act in this

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regard. *Pamph. L.* 1853, p. 437; *Nix. Dig.* (1861) 525; *Id.* (1868) 572. *Edwards v. Derrickson* was affirmed in this court (29 N. J. L. 468), the argument there being that the court below erred in holding, as it did, that the flume item was lienable. Page 473. Nothing was said in the discussion about vitiation of the whole claim thereby, though the point is stated on page 470.

No case is cited, and we can find none, holding that the whole claim is vitiated because of one or more items improperly set out in the bill of particulars. And whereas the earlier cases leaned toward a strict construction of the act, recent adjudications are somewhat to the contrary. *Buchanan & Smock Lumber Co. v. Einstein*, 87 N. J. L. 307; *Gardner & Meeks Co. v. Herold*, 76 *Id.* 524. Great liberality has been exercised by the courts in permitting amendments, both of defective particulars, even after expiration of the time for filing the lien (*American Brick Co. v. Drinkhouse*, 59 *Id.* 462, 465, 466), and by adding the names of parties to be affected within that time. *Vreeland Building Co. v. Knickerbocker Sugar Co.*, 75 *Id.* 551. Such cases illustrate the tendency of the courts to give full effect to the law within its language and spirit without working injustice. The rule propounded with respect to the bill of particulars by a careful student of our statute, is that "a claim is not necessarily bad, for including illegitimate, as well as legitimate, items; for it may stand, *quoad* the good items; but if the good and the bad items are inseparably blended, the claim will be bad." *Luce N. J. Mech. Lien L.* (2d ed.) 96. We think this is a substantially correct statement of the law; so, that if the claim in the case at bar contained items set forth in accordance with the statute, either in its original form or as amended, it would have been improper to nonsuit because other items may have been insufficiently stated, there being no question of willful or fraudulent misstatement.

We turn, then, to an examination of the claim as amended on the original motion to nonsuit.

The \$1,500 item was not amended.

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The \$80 item was amended by stating that the work was done in February or March, 1913, by agreement between the builder and the contractor.

The same amendment was made to the items of \$50, \$15 and \$8, also to the items of \$68 and \$253.

A reading of the whole bill of particulars will make it fairly plain that the plaintiff claimed to have executed a building contract dated October 29th, 1912, and extras to that contract specially agreed upon; that he had received all payments under the main contract, except the last, and claimed for that, and also for the price of the extra work as agreed; and that he had completed the building described in the lien on April 29th, 1913. This we consider a sufficient specification, at least, as to some of the extra items. The statute makes a special provision, touching work done under contract, as already noted. A general statement that the work was done by contract at a price mentioned is sufficient; and the amended items in this respect complied with the statutory requirement. The dates assigned (February or March, 1913) are somewhat indefinite, especially as the claim was not filed until June 26th, and suit was not begun until July 1st; but the original contract and extras incidental to the construction of a satisfactory building constituted one complete work, and the claim was filed well within four months from the date of the last work done or materials furnished as set out in the claim. This time limit is the underlying reason for a particular statement of dates. *Associates v. Davison*, 29 N. J. L. 421, 422. In that case there was no claim for contract work. The present case is more like *Williamson v. New Jersey Southern Railway Co.*, 28 N. J. Eq. 277, 296; *affirmed*, 29 *Id.* 311, 315, where there was a general statement of contract work.

We conclude, then, that there was after amendment a sufficient claim for certain contracted extras to a main contract, for an entire work completed April 29th, 1913, and, consequently, that at least as to part of the claim there was a case for the jury. This being so, the question whether plaintiff was entitled to recover on other items is immaterial here.

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because those items were not legally challenged except on motion to nonsuit.

There remain, however, a number of points made by defendant on the trial, which, if well taken either in whole or part, would require an affirmance of the judgment of the Supreme Court, notwithstanding our dissent from the view expressed by that court on the questions just discussed.

First, that plaintiff failed to reply to the answer, which set up among other things plaintiff's failure to procure the architect's certificate required by the contract as a condition precedent to the last payment. There was a preliminary motion to nonsuit on this ground, which the court denied, some two weeks before the trial. No exception was taken to this ruling. At the opening of the trial, plaintiff moved to "add to his reply allegations of fraud on the part of the architect and waiver as to written authority on the part of the owner." Defendant objected on the ground of laches. The motion was granted, and no exception was prayed. There was no reply then to amend, it is true, but the purport of the motion was plain, viz., to put the record into shape to try out the issue that was in fact tried, of fraud by the architect in refusing the certificate, on the theory of *Chism v. Schipper*, 51 N. J. L. 1, and *Bradner v. Roffsell*, 57 Id. 412. Defendant no doubt was entitled to have the record perfected before going on with the trial, but did not make this point. We find no injurious error properly before us in this phase of the case. The Supreme Court afterwards allowed the reply to be filed.

Next, the apparent confusion of builder and owner in the claim was clarified by an amendment made during the trial by the trial judge, under the act of 1911, page 47. Both were originally charged both as builders and owners, and the amendment limited the claim so as to charge Poysher only as builder and Stahl solely as owner. Whether their liability could have been enlarged by an amendment after the time for filing the claim had expired, is not now in question. In the case of each it was diminished, and they were not legally harmed thereby, nor were outside parties injuriously affected.

The point that the order for amendment of the lien claim was entitled in the cause, is as we think without substance. If improperly so entitled, it is not thereby vitiated, as the error is of form only. Moreover, it is open only to collateral attack in this cause, on the ground that the judge had no jurisdiction to make it. *American Brick Co. v. Drinkhouse*, 59 N. J. L. 462, 466.

With respect to the refusal of the architect to issue a certificate, the question whether that refusal was fraudulent was left to the jury under instructions to which no exception was taken. Defendants' position is that there was no question of fraud raised on the evidence. It is inferable from the architect's own testimony that he was ready to issue the certificate, but that the defendants wished to cut down the final payment by several hundred dollars on account of a counterclaim which the architect refused to recognize or support except for a much smaller sum; that he advised the plaintiff to "get after them and get his money;" and that when plaintiff asked for the certificate, it was on the day before suit was begun, after plaintiff had retained counsel, and that he then refused it because he "did not want it to appear that he was issuing a certificate for a case." Such a reason was, of course, no reason at all, and led the judge very naturally to inquire of the witness whether he did not think that he had assumed responsibilities not belonging to his duties as architect. If the witness' statement was true, and there was no reason to believe the contrary, his refusal under such circumstances was fraudulent in the sense in which the court understood it in *Chism v. Schipper* and *Bradner v. Roffsell*, *ubi supra*. It is claimed that, to constitute such fraud, the owner must be a participant. If this were the rule, a corrupt architect would be greatly aided in extorting money from the contractor as a condition of awarding a certificate that was fully earned. The injustice of such a situation is obvious.

The next point is that the extra work claimed was done, if at all, without a written order and agreement in writing as to the cost, as required by the main contract. The answer

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is that the evidence brings the case within the rule of *Headley v. Cavileer*, 82 N. J. L. 635.

The next two points, as to charges for work required by building regulations of the city, and the date when the work was completed, do not call in question any ruling of the trial court.

The next point is that suit was not begun until July 1st, 1913, and that this was over four months after completion. This also is a question of fact arising on the evidence, some of which was to the effect that the work was not completed until April 26th.

A number of rulings on evidence are attacked which we deem it unnecessary to discuss in detail. It should be sufficient to say that we have examined them all and find no injurious error in any of them. The point that the verdict was contrary to the charge of the court is not one that we can review on this appeal.

The last point is that time was of the essence of the contract. It does not seem to have been made at the trial, unless included in the broad ground taken on the motion to direct a verdict for defendant, that there was no evidence to show a completion of the contract according to its terms. This we think did not point out the time element so as to require the trial judge to rule on it; but conceding that it did, defendant, who had accepted the building, could claim no more than damages for the delay, for which there seems to have been no claim in the answer.

The judgment of the Supreme Court will be reversed and that of the Circuit Court affirmed.

For affirmance—None.

For reversal—THE CHANCELLOR, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

89 N. J. L.State v. Reilly.

THE STATE, DEFENDANT IN ERROR, v. JAMES P. REILLY,
JR., PLAINTIFF IN ERROR.

Submitted July 10, 1916—Decided November 20, 1916.

When a party asks for an instruction to the jury which is partly good and partly bad, it is proper to refuse it altogether.

On error to the Supreme Court, whose opinion is reported in 88 N. J. L. 104.

For the plaintiff in error, *William R. Wilson*.

For the defendant in error, *Alfred A. Stein*.

The opinion of the court was delivered by

PARKER, J. We conclude that the judgment of the Supreme Court, affirming the conviction in the Union Quarter Sessions, should be itself affirmed, and concur in the opinion delivered for the Supreme Court by Mr. Justice Bergen, except in the particular now to be specified.

At the trial the defendant requested the court to charge "that the burden of proof that a person charged with bigamy has not been actually absent from his wife for five years, and that she was known to him to be living within that time, is on the state and not on the defendant."

The Supreme Court held that the request was sufficiently complied with by charging the burden of proving that the first wife was alive, "in connection with what the court said on the same subject immediately following," which, as the Supreme Court held, "put the burden on the state of proving affirmatively and beyond a reasonable doubt that the defendant had not been continually absent from his wife for five years, and that she was known to him to be living within that time."

Our examination of the charge leads us to the view that the request was not sufficiently complied with. The matter "immediately following" is undoubtedly the portion of the charge where the judge said that the defendant would be innocent of bigamy if he did not know that his wife was alive, and if it appears that he had not heard from her during a period of five years prior to his second marriage. This is a very different thing from saying that the state must prove that he did know. We think that this part of the opinion is not justified by the record.

But this does not lead to a reversal, for we consider that defendant was not entitled to the request in the form in which it was made, because it called for the imposition of the burden on the state of showing, both that defendant had not been continually absent from his wife for five years, and that she was known to him to be living within that time. If defendant was entitled to the second branch of this request, as to which we express no opinion, still he was not entitled to the first.

Our statute, section 52 of the Crimes act (*Comp. Stat.*, p. 1762), is substantially similar to the English act (see *Bish. Stat. Crimes*, § 581) and dissimilar to the New York act, which puts the exception in the enacting clause. *Fleming v. People*, 27 N. Y. 330. The Supreme Court properly held, that under our act the indictment need not negative the exception. There is of course ample authority for this rule with regard to exceptions and provisos not contained in the enacting clause. As a corollary, the burden of proof is generally on the defendant to bring himself within the exception. 5 *Cyc.* 700; *Plainfield v. Watson*, 57 N. J. L. 525. The rule as laid down by Mr. Bishop (*Stat. Crimes*, § 607) is that when the state has shown the two marriages and that the first wife was alive at the time of the second, "the defendant may rebut this *prima facie* case by proof of her seven years' absence. Then, if the state contends that nevertheless he knew her to be alive within this period, it must prove his knowledge; he is not required negatively to establish his want thereof. And

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the jury are to determine, under all the evidence, what the real fact as to his knowledge was."

As already stated, we are not required to pass on the question whether the burden is on the state to prove the defendant's knowledge that the first wife was living within the statutory period. It is sufficient to say that the request was vitiated by the inclusion of the erroneous proposition that the burden was on the state to prove that defendant had not been continually absent from his wife for five years. Where a party asks for an instruction which is partly good and partly bad, it is proper to refuse it altogether. *Gardner v. State*, 55 N. J. L. 17; *Consolidated Traction Co. v. Chenoweth*, 58 Id. 416; *affirmed*, 61 Id. 554; *Dederick v. Central Railroad Co.*, 74 Id. 424. There was, therefore, no error in failing to charge in the language of the request.

Let the judgment be affirmed.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

FRANK J. HIGGINS, ADMINISTRATOR OF SIMON CLEARY, DECEASED, APPELLANT, v. ERIE RAILROAD COMPANY AND WELLS-FARGO & COMPANY, RESPONDENTS.

Argued June 23, 1916—Decided November 20, 1916.

1. An express company engaged in transporting merchandise for hire is not a "common carrier by railroad" because it contracts with a railroad company for transportation of such merchandise, and therefore is not subject to the provisions of the act of the congress of the United States relating to the liability of common carriers to their employees in certain cases, approved April 22d, 1908.

2. The plaintiff's intestate was the servant of an express company, and in the performance of his service was drawing a truck along the platform of a railroad company so near its edge that the rear of the truck was struck by a passing engine and the collision caused him to be thrown under it, which ran over and killed him. He had been in the service long enough to know that engines were constantly passing along the rails next to the platform, which was of sufficient width to allow him to keep the truck beyond the danger of being struck by that part of the engine which ordinarily overlaps the edge of the platform, and the accident happened because the deceased was pulling the truck within the range of that part of the engine which usually overlaps a properly constructed platform. *Held*, that the negligence of the deceased contributed to the accident and the railroad company was not liable.

On error to the Supreme Court.

For the appellant, *Alexander Simpson*.

For the respondents, *Collins & Corbin*.

The opinion of the court was delivered by

BERGEN, J. This action was instituted against the Erie Railroad Company and the Wells-Fargo & Company to recover damages for the death of the plaintiff's intestate. The liability of the Wells-Fargo & Company is rested on the federal statute entitled "An act relating to the liability of common carriers to their employes in certain cases," approved April 22d, 1908, and that of the railroad company on the negligent operation of one of its engines. The trial court directed a nonsuit as to each defendant from which the plaintiff appeals. At the close of the plaintiff's case the following facts were established: The Wells-Fargo & Company was engaged in what is usually called an express business, receiving, transporting and delivering articles of merchandise for hire, and in conducting this business used, among others, the railway facilities of the defendant company, and employed a number of persons, of whom the deceased was one, to load and unload the merchandise at the railroad company's terminal in Jersey City, and in doing this it was necessary to use

trucks, moving them along platforms provided by the railroad company. The deceased was in the service of the Wells-Fargo & Company, and not of the railroad company, and on the day of the accident was pulling an empty truck, which had only a single handle, along a platform to meet an incoming car, and while he was doing this drew the truck so near the edge of the platform that it was struck by a part of one of the engines of the railroad company, which overlapped the platform, the force of which threw the handle of the truck against the deceased causing him to fall on the track so near the engine that three wheels of the tender ran over his body and killed him. It is not claimed that the platform was a faulty construction or that the overlap was unusual. It further appeared that the deceased had worked there for two weeks; that trains and engines were constantly running along the platform, some going in, and others backing out with the tender first in order to reach a switch, all of which was within the observation of the deceased. Plaintiff produced but two witnesses who saw the accident, one a passenger who had just alighted from a train who testified that the deceased was pulling the truck with his back towards the approaching engine, which was backing out with tender ahead, and that the truck was so near the edge of the platform that the tender struck about an inch of the truck, the collision throwing the deceased under the tender. The other witness was the fireman running the engine, who said that he saw the man and the truck as he was approaching, both being far enough away to clear the engine, but that just as the tender reached the truck the deceased turned as if to cross the platform which threw the truck against the overlapping beam of the tender, and, although he put on the brake and reversed his engine at once, some of the wheels of the tender ran over the deceased. So, we have this situation, either the deceased was drawing the truck so near the edge of the platform that it was in danger of being struck by the overlap of the tender, or that the deceased by turning the truck brought it against the tender.

In either case the truck must have been very near the edge

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of the platform, which was of sufficient width to allow the deceased to keep beyond the danger of being hit by passing engines. The case of the defendant Wells-Fargo & Company manifestly does not fall within the purview of the act of congress relied upon by the plaintiff, for it is not a common carrier "by railroad," to which class of carriers alone the statute applies, and, therefore, as to this defendant, the nonsuit was correct. As to the other defendant, the Erie Railroad Company, we think the undisputed evidence shows that the deceased contributed to the accident, even if the defendant was guilty of negligence in operation of its engine, a question we are not called upon to determine in this case.

The law is well settled in this state that where a person places himself so near the edge of a railroad platform as to be within the line of the ordinary overhang of a properly-constructed platform and engine he contributes to the injury, and the company is not liable for the injuries he may suffer from such negligent exposure to danger. *Dotson v. Erie Railroad Co.*, 68 N. J. L. 679. In this case we have this condition: The deceased was employed in a terminal station, where he must have known from ordinary observation that engines were passing constantly along the station platform; that they were being run both forward and backward, and that they overlapped the platform in an ordinary manner, still, with this knowledge, he drew the truck so near the edge of the platform as to be within the range of the overlap. If he had been walking along the platform with his back to the engine, so near the edge as to have been struck by the overlap, the case would be precisely that shown in *Dotson v. Erie Railroad Co.*, *supra*, in which this court held that plaintiff could not recover, and clearly, the rule is not affected because the deceased, instead of standing in a place which common knowledge teaches is dangerous, places a truck which he is drawing in a like position, and which if struck by a passing train will probably injure him. The negligence of the defendant's servant does not excuse the contributory negligence of the plaintiff.

The judgment appealed from is affirmed, with costs.

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Penna. Co. for Ins., &c., v. Marcus.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, PARKER, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, TAYLOR, JJ. 11.

For reversal—MINTURN, KALISCH, GARDNER, JJ. 3.

THE PENNSYLVANIA COMPANY FOR INSURANCE OF
LIVES ET AL., RESPONDENTS, v. ANDREW MARCUS,
APPELLANT.

Argued June 30, 1916—Decided November 20, 1916.

A statute prohibited the entry of a judgment on any bond where a mortgage has or may be given for the same debt, unless, prior to the entry, there shall be filed with the clerk or register of the county in which the mortgaged premises are located, a written notice of the proposed judgment setting forth the court in which it is proposed to enter the judgment, with the place of record of the mortgage and a description of the mortgaged premises. *Held*, that the statute is not unconstitutional when applied to bonds existing before its approval, for it does not impair the obligations of contracts or deprive the holder of any remedy which existed when the contract was made, in violation of the constitution of this state, for it relates to a method of procedure, and does not curtail or restrict a remedy in derogation of the terms of the contract.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 37.

For the respondent, *Lewis Starr*.

For the appellant, *Clarence L. Cole*.

The opinion of the court was delivered by

BERGEN, J. The plaintiff entered a judgment by confession against the defendant as authorized by the terms of a warrant of attorney annexed to a bond, the payment of which

was secured by a mortgage on lands. When the defendant discovered this he applied for, and was allowed, a rule to show cause why the judgment should not be opened and set aside, because the notice required to be filed, by an act entitled "Supplement to an act entitled 'An act concerning proceedings on bonds and mortgages given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder,' approved March twelfth, one thousand eight hundred and eighty" (*Pamph. L. 1907, p. 563*), did not state in what court it was intended to enter judgment.

The Supreme Court discharged the rule and the defendant appeals, as he is entitled to in a proceeding of this character. *Knight v. Cape May Sand Co.*, 83 N. J. L. 597. It is admitted that while a notice was filed, it did not comply with the act of 1907 above mentioned, in that it did not state the name of the court in which it was intended to enter judgment. The Supreme Court decided that the notice was fatally defective, but being of opinion that the act did not apply to bonds given prior to its approval, discharged the rule, and the only question argued here was the legal correctness of this result.

The view of the Supreme Court was that the statute of 1907 imposed upon the plaintiff an additional burden in the enforcement of his bond, and to that extent deprived him of a less burdensome remedy existing at the time the contract was made.

In support of this result, the Supreme Court cited a number of cases, viz., *Bradley v. Lightcap*, 195 U. S. 1, where the subsequent statute affected the right of redemption; *Walker v. Whitehead*, 83 Id. 314, in which the subsequent statute made it unlawful for the plaintiff to have a judgment, unless "he has made it clearly to appear before the tribunal trying the same that all legal taxes chargeable by law upon the same have been duly paid for each year since the making or implying of said debt or contract." In this case the court said, "The states may change the remedy providing that no substantial right secured by the contract is impaired * * * it must be left with the same force and

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effect, including the substantial means of enforcement which existed when it was made," and it was decided that the purpose of the act was not to collect back taxes as a means of purgation, but to bar the debt and discharge the debtor. The Supreme Court also relies upon *Wilkinson v. Rutherford*, 49 N. J. L. 241, which simply applies the rule laid down in *Baldwin v. Flagg*, 43 Id. 495, and *Morris v. Carter*, 46 Id. 260, where it was held that the rule adopted in *Baldwin v. Flagg* was applicable to a suit on a bond secured by a mortgage given before the act was passed.

Neither of these cases is applicable to the present question.

The case of *Baldwin v. Flagg*, *supra*, is perhaps the one upon which the Supreme Court, and the respondent on the argument, most rely, but we think it is clearly distinguishable from the case under review, and in order to show this it will be necessary to refer briefly to the legislation relating to this question. In 1880 (*Pamph. L.*, p. 255) the legislature provided—*first*, that there should be no decree in foreclosure proceedings for any balance of money above the proceeds of the sale of the mortgaged property, *i. e.*, there should be no decree for a deficiency in proceedings to foreclose a mortgage, as theretofore had been the practice; *second*, that in all cases where a bond and mortgage had been, or might thereafter be, given for the same debt, it should be lawful to first foreclose the mortgage and in case of a deficiency to proceed on the bond; *third*, that if, after the foreclosure, the person who was entitled to the debt should recover a judgment on the bond for any balance, such recovery should open the foreclosure sale, and give the owner of the property the right to redeem by paying the full amount of the decree; provided the suit for redemption be brought within six months after the entry of such judgment.

In 1881, sections 2 and 3 of this statute were amended, section 2 by requiring the first proceeding to collect such a debt to be commenced by a foreclosure of the mortgage, instead of making it lawful as in the act of 1880, and adding that all suits on such bonds for deficiency should be brought within six months of the foreclosure sale; the amendment

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of section 3, giving to the person against whom the judgment was recovered the right to redeem, instead of limiting it to the owner as theretofore.

The supposed evil which this statute was intended to cure, arose out of the fact that many persons after giving a bond and mortgage would sell the property, subject to the mortgage, and on its foreclosure have no notice thereof, and thus no opportunity to protect himself by redemption of the property, by purchase or otherwise, and would be compelled to pay a deficiency, although the mortgaged premises might in fact have a market value greater than the debt, or at least the obligor in the bond might be willing to take the property for the debt. The remedy given was that if the holder of the bond undertook to enforce it for a deficiency, he must do so within six months after the sale, and if he recovered a judgment thereon the effect was to open the sale and to permit the person against whom the judgment was entered to redeem. He might, perhaps, have no notice of the foreclosure proceedings, but he would have notice of the suit against him with an opportunity to redeem if he desired.

In 1907 (*Pamph. L.*, p. 563) the legislature passed a supplement to the act of 1880, as amended in 1881, and in it provided that, "No judgment shall be entered by confession on any bond where a mortgage has, or may hereafter be, given for the same debt, or in any action on said bond, unless prior to the entry of such judgment, if the same shall be by confession, or prior to the beginning of such action, if the proceedings be by action, there shall be filed in the office of the clerk of Common Pleas, except in counties where there is a register of deeds and mortgages, then in the office of the register of deeds and mortgages, of the county in which the lands described in the mortgage given with such bonds are situate, a written notice of the proposed judgment or action setting forth the court in which it is proposed to enter such judgment, or begin such action, the names of the parties to such bond and to such judgment or action, the book and page of the record of the said mortgage, together with a description of the lands or real estate described therein." The purpose

of this act is manifestly to give notice to parties interested of the intention to enter a judgment, or of the bringing of an action which, if pursued to judgment, would open the foreclosure sale, of which the purchaser at the foreclosure sale, or the obligor, if the judgment was entered by confession, would have no other notice. As the bond and mortgage in the present case were given long after the act of 1881, the holder is subject to all the provisions of that act, that is, he must first foreclose his mortgage, and if he enters a judgment on the bond for any deficiency, the foreclosure sale will be opened and the obligor permitted to redeem. The only additional burden imposed by the act of 1907 is that before entering judgment on the bond and warrant, or commencing an action thereon, the plaintiff, prior to the entry of such judgment or commencing his action, shall file with the clerk of Common Pleas or register of deeds of the county in which the land is located, the written notice above set out.

In the case of *Baldwin v. Flagg*, *supra*, it was held that because the act of 1881 "enlarges the time for the payment of the money secured by the bond beyond the period named in it for payment, and postpones the default of the obligor until the remedy of the collateral security of the mortgage is exhausted," it did not apply to a bond executed prior to the approval of the act, for it not only postponed "the obligee's remedy on his bond until the foreclosure proceedings are terminated, but has also impaired the value of the mortgaged security by subjecting the purchaser's title to conditions of redemption after sale, which must diminish the vendible value of the mortgaged premises."

Thus it appears that the act of 1881 is not one of procedure but one that related to the obligee's remedy. Before that act he was not bound to first foreclose his mortgage, and the legislation necessarily postponed the date when it could be enforced according to its terms. No such condition is created by the act of 1907.

The obligee in the present case is subject to all the requirements of the act of 1881, as his bond was executed in 1905, and the only question here is whether his remedy is illegally

altered because he is required by the act of 1907 to file a notice before entering a judgment on his bond.

We are of opinion that the required notice is a matter of procedure, imposing no new burdens or restrictions which materially impair the value and benefit of the bond, for it does not modify the nature or extent of the remedy any more than would a statute requiring suit to be commenced by serving a complaint containing a copy of the bond, instead of by summons without such a copy, or the filing of a *lis pendens* before commencing an action.

The right to enter a judgment is not taken away or postponed, and the due day of the bond is not extended nor the value of any security given by the contract affected, as was the situation in *Baldwin v. Flagg*. The obligee has all the remedies he was entitled to when the bond was executed, and there is no new limitation or curtailment of his remedy; all the act of 1907 does is to introduce a new method of procedure requiring the filing of what is said in *Neu v. Rogge*, 88 N. J. L. 335, to be a *lis pendens*. Legislation which merely requires the filing of a preliminary notice of this character in a remedial proceeding for the enforcement of a contract existing when the statute was passed, does not impose a burden or restriction impairing the value or benefit of such a contract.

We are entirely satisfied that the statute of 1907 above mentioned, which only requires the filing of a prescribed notice as a prerequisite to the entry of a judgment by confession, does not impair the obligation of contracts or deprive "a party of any remedy for enforcing a contract which existed when the contract was made," as prohibited by article 4, section 7 of the constitution of this state, and is therefore applicable to contracts existing when it was adopted.

The judgment appealed from will be reversed.

For affirmance—THE CHIEF JUSTICE, PARKER, WHITE, JJ. 3.

For reversal—THE CHANCELLOR, SWAYZE, BERGEN, MINTURN, HEPPENHEIMER, GARDNER, JJ. 6.

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Rogers v. Thompson.

EDWIN D. ROGERS, APPELLANT, v. CHARLES S. THOMPSON, RESPONDENT.

Argued June 28, 1916—Decided November 20, 1916.

1. The meeting of the creditors of a bankrupt for the election of a trustee held by a referee in bankruptcy to whom the matter had been referred by the bankruptcy court, is a judicial proceeding, and a slanderous communication made by counsel for some of the creditors to the referee at such a meeting, concerning one of the candidates for election as trustee, if relevant and pertinent to the subject-matter under consideration, is privileged, and counsel is not liable in an action for slander although what was said was uttered maliciously.
 2. At such a meeting creditors are entitled to be represented by an agent, attorney or proxy, and one employed as attorney for a creditor is entitled to the privilege accorded to counsel in any judicial proceeding.
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On appeal from the Supreme Court, Burlington Circuit.

For the appellant, *V. Claude Palmer*.

For the respondent, *James Mercer Davis*.

The opinion of the court was delivered by

BERGEN, J. At a meeting of the creditors of a bankrupt held for the election of a trustee by a referee in bankruptcy duly appointed by a federal court having jurisdiction of bankruptcy cases, the plaintiff was a candidate for election as trustee, and the defendant, appearing for some of the creditors opposing such election, said to the referee, "He is not a fit man, he is not straight and upright; I do not think our claim will be properly taken care of." Because of this statement the referee refused to approve the election of the plaintiff and another was selected, whereupon plaintiff brought his action against the defendant for slander based upon the words above quoted from the plaintiff's complaint. The trial court directed a verdict for the defendant upon two grounds—(a) that the communication being uttered in the course of a legal

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proceeding was privileged; (b) that if the proceedings were not judicial the utterance was made under a qualified privilege requiring plaintiff to prove malice, in which respect the court held that the plaintiff had failed. The pertinent part of the case bearing upon the question whether the statement was made during the course of a judicial proceeding or not consists of an admission by defendant that the referee "was conducting a creditors' meeting for the election of a trustee in the bankruptcy estate of Samuel N. Lamb, in Mount Holly; that at that time the creditors were assembled and nominations made for the office of trustee; that in that proceeding Mr. Charles S. Thompson appeared as attorney for one of the creditors, and that he made the statement attributed to him in the complaint on that occasion," and also of the record of the proceedings before the referee in which it appeared, among the list of "appearances," that the defendant was present representing two creditors, and that when plaintiff was nominated a majority of the creditors voted for him, whereupon the defendant objected to his appointment, and after taking testimony the referee sustained the objection, and called for other nominations, which was complied with and another person elected.

It also appears that defendant was a member of the bar of the State of Pennsylvania, and duly admitted to practice in the United States District Court, for the district of the State of New Jersey, that court having jurisdiction of the bankruptcy matter which it had referred to the referee before whom proceedings were being held, and that the defendant was present as an attorney representing two creditors entitled to participate in the election.

It is necessary to determine at the outset whether the utterance complained of, assuming it to be slanderous, was used in a legal proceeding by one authorized to speak for any of the parties interested in the investigation, and whether it was relevant and pertinent to the matter under consideration, for, if so, it was privileged even if malicious and intended to defame. In *La Porta v. Leonard*, 88 N. J. L. 663, Mr. Justice Minturn, speaking for this court, said: "Counsel is not liable

to a civil action, nor to a criminal proceeding for anything he may have said in the course of a trial or investigation, although malicious and intended to defame, provided it was relevant and pertinent to the subject-matter of the controversy." That the communication to the referee in the present case was relevant and pertinent to the subject-matter cannot be doubted, for the qualifications of the trustee as to ability and character was material to the creditors and they were entitled to know whether the person to be entrusted with the assets to be administered for their benefit possessed the proper qualifications. Having determined that the communication was relevant and pertinent, the next question to be considered is whether such proceedings before a referee in bankruptcy is a legal or judicial investigation or proceeding.

The act of the congress of the United States relating to bankruptcy (*Comp. Stat.*, § 9622) invests referees in bankruptcy, subject to review by bankruptcy courts, with jurisdiction to consider all petitions referred to them and to make the adjudications or dismiss the petitions; to perform such part of the duties except applications for compositions or discharge, "as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders by the court of bankruptcy of their respective districts, except as herein otherwise provided." Section 9639, subdivision (b) provides that at the first meeting of the creditors, when the trustee is to be elected, "the judge or referee shall preside, and before proceeding with the other business may allow or disallow the claims of creditors."

We have no doubt that the first meeting of the creditors held in this case was a legal proceeding, during which relevant remarks of counsel are privileged, for either the judge of the District Court, or the referee to whom jurisdiction is given to perform all the duties of judge, may preside.

If the judge were present it would hardly be questioned that he was presiding at a judicial proceeding at which a legal matter was being investigated and the federal statute confers upon the referee when he presides the same jurisdiction.

"The referee, in fact, becomes to all intents and purposes

the court of bankruptcy as soon as the case is referred to him." 1 *Rem. Bank.*, § 523, and cases cited.

The meeting was held as part of the proceedings of the court of bankruptcy and was clearly a legal proceeding, and, therefore, if the words charged as slanderous were spoken by one authorized to act as attorney or counsel for one of the parties to the proceeding, they were privileged.

The words alleged to be slanderous, being relevant and pertinent to the issue, and having been uttered during the course of a judicial or legal proceeding, the last question to be decided is whether the defendant was acting as counsel for some of the creditors. He testifies that he represented two creditors as counsel, and the record of the referee's proceedings show that he appeared as counsel for them. He is a member of the bar of the State of Pennsylvania, and duly admitted to practice law in the United States District Court for the district of New Jersey, and he appeared for clients in a judicial proceeding in which parties are allowed to be represented by counsel. The first section of the Federal Bankruptcy act, in defining certain terms, declares that the term "creditor" may include "his duly-authorized agent, attorney or proxy." In the present case, defendant appeared as the duly-authorized attorney-at-law of two interested parties in a legal proceeding in which his clients were entitled to appear by agent, attorney or proxy. We are of opinion that defendant was acting as counsel for interested parties in a judicial proceeding when the communication complained of was made to the referee, and that what was said was relevant and pertinent to the matter under investigation and therefore privileged.

This makes it unnecessary to consider the other question raised by the appellant.

The judgment is affirmed, with costs.

For affirmance—THE CHIEF JUSTICE, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, BLACK, WHITE, HEPENHEIMER, JJ. 9.

For reversal—THE CHANCELLOR, GARRISON, KALISCH, WILLIAMS, JJ. 4.

89 N. J. L.Smith v. D., L. & W. R. R. Co.

JAMES H. SMITH, PLAINTIFF-RESPONDENT, v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, DEFENDANT-APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

Where a railroad company lands a passenger not at its regular station platform, but in a place where the surface of the ground is uneven, and the spaces between the rails of the tracks the passenger must cross to reach the station and street are at least five inches in depth, and in so crossing, without aid from the company's servants, or warning of the unusual conditions, the passenger is thrown and injured because of the condition, a motion for nonsuit, upon the ground that plaintiff had not shown that the construction of the platform and tracks was different from that in general use under like conditions, was properly refused. It is not a question of construction, but whether by acts of omission or commission the defendant neglected to perform its duty to provide a reasonably safe way for its passengers.

On appeal from the Supreme Court.

For the appellant, *Frederic B. Scott*.

For the respondent, *Arthur A. Palmer*.

The opinion of the court was delivered by

BERGEN, J. The plaintiff was a passenger of the defendant, and his destination Bernardsville, New Jersey. On the arrival of the train passengers were not delivered at the station platform, but the train was stopped on a side track between which and the station was located the main line of tracks over which passengers were required to pass to reach the station. The ground on which the plaintiff was landed was about three inches lower than the top of the first rail of the main line, and the surface between the rails five inches below the top of the rail. In crossing the space between his landing and the station, plaintiff had to pass in front of a

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train standing on the main line, and striking his toe against the first rail he was thrown forward so that his foot struck the ground between the rails of the main line, which was so much lower than the adjacent surface as to cause him to lose his balance, and he fell across the tracks and against the platform, resulting in injuries for which he brought his suit and recovered the judgment from which defendant appeals.

The first point which defendant argues is that it was error to refuse his motion for a nonsuit and direction because there was no proof that the construction of its roadbed and station platform was not the type of construction usual in such cases, and that the sole question remaining was whether the operation of the standing train was such as to create in the mind of the plaintiff a fear of imminent danger. This proposition is based upon a false premise, for the question was not one of construction of railroad or platform, but whether by the operation of its trains the defendant had provided the plaintiff with a proper landing place when he was left with his family between two lines of tracks with an uneven surface to cross, with a reasonable apprehension that the standing train might start, and was compelled to pass over uneven ground in order to leave the company's property.

It was a jury question whether under all these circumstances it was not defendant's duty to warn or assist the plaintiff in proceeding in the only direction the defendant had provided for egress to the street. As was said by Mr. Justice Garrison, speaking for this court in *Gore v. Delaware, Lackawanna and Western Railroad Co.*, ante p. 224: "The stopping of the train at one place rather than at another, the providing of proper light, the presence of trainmen to assist passengers in alighting under certain circumstances, or to warn them of certain conditions, are pure matters of operation."

Therefore, the motions rested upon the ground of proper construction of platform and tracks were properly refused.

The negligence was not one of construction but of landing a passenger in a place adopted by defendant for the conven-

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ient operation of its trains, and whether this course raised a duty which defendant neglected to fulfill was to be determined from all the circumstances, which is the province of a jury.

The next point is, that it was error to leave the question of construction to the jury, the court having charged, as requested by the defendant, that there was no proof of improper construction. We think counsel misconceives the action of the court. The court in charging the jury instructed them that it was the duty of the defendant to provide a reasonably safe place for passengers to leave the train and get to the public street; he then said that defendant contended that this was a reasonably safe place; that the station and tracks were of the ordinary sort, "and that I think is not disputed in the evidence, and it may be that you may find that so far as the construction is concerned, there was nothing for which you could find negligence." We see no error in this; what the defendant contended was that the station and track were so constructed that no negligence could be inferred from that, and that the construction included the way the defendant had furnished. In this part of the charge the court was dealing with the defendant's contention and was more liberal to defendant than it was entitled.

The court, subsequently, in charging as defendant requested, took from the jury any question of the faulty construction of the station and tracks.

There is no error in this record harmful to defendant and the judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, TAYLOR, GARDNER, JJ. 12.

For reversal—SWAYZE, PARKER, JJ. 2.

Wood v. Millville.89 N. J. L.

WALTER WOOD, APPELLANT, v. CITY OF MILLVILLE,
RESPONDENT.

SIR JOHN FRANKLIN, APPELLANT, v. CITY OF MILLVILLE
AND MILLVILLE WATER COMPANY, RESPONDENTS.

SIR JOHN FRANKLIN, APPELLANT, v. CITY OF MILLVILLE
AND PEOPLES WATER COMPANY, RESPONDENTS.

Argued June 27, 1916—Decided July 6, 1916.

1. That a city is being furnished with a needful supply of water by a private corporation is not alone sufficient to estop it from taking the water plant for public use under its power of eminent domain, even if it be doubtful that the income to be derived will be sufficient to cover the cost of operation, and taxation may be necessary to supply any deficiency, nor is judicial interference justified upon the ground that such action is, under the circumstances, an unreasonable exercise of the power of condemnation.
2. A contract between a water-supply company and a city to supply water to it is property, and may be condemned as an incident to the taking of the property for a public use, and the right of eminent domain may be exercised, if the power has been delegated by the contracting city, for such a proceeding does not impair the contract but appropriates it as property.

On appeal from the Supreme Court.

For the appellants, *Herbert C. Bartlett* and *Joseph H. Gaskill*.

For the respondents, *Louis H. Müller*.

The opinion of the court was delivered by

BERGEN, J. The writs of *certiorari* allowed in each of the above-entitled cases seek the review of certain proceedings taken by the city of Millville to acquire, by purchase or condemnation for the use of the city, the water works, property and franchises of the Millville Water Company of New Jersey

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and the Peoples Water Company of Millville, New Jersey, two rival water companies operating in the city. The proceedings are rested on the provisions of an act entitled "An act to enable cities to supply the inhabitants thereof with pure and wholesome water" (*Pamph. L.* 1876, p. 336; *Comp. Stat.*, p. 823), and the supplements thereto and the amendments thereof. This statute is not operative in any city until assented to by a majority of the voters of such city at an election held for the purpose of obtaining such consent or its rejection, as the majority may decide. This record shows that such an election was held June 11th, 1912, and the statute assented to by a majority of the voters who voted at the election. One of the writs was allowed to review the legality of this election, and the other two to review ordinances providing for the acquisition of the properties of the two water companies and the issue of bonds to meet the cost thereof. The three cases were argued together on one record, which embraces all the proofs taken in each.

As the power to acquire the water plants depends upon the assent of the voters to adoption of the act upon which the ordinances rest, that question will be first considered and determined. It is first urged that the ballot prepared for the election was not in proper form because the instructions to the voter were made a part of the ballot and so blended with the proposition submitted as to mislead and confuse the voter. The ballots were prepared by a public officer to whom that duty was assigned, and if the instructions had no proper place on the ballot, the voter cannot be disfranchised by such a mistake, if it be a mistake, for he must accept and use the ballot provided. In the present case the ballot contained a statement that if the word "for" be marked off or defaced, it would be counted as a vote against adoption, and if the word "against" was erased, it would be counted as a vote in favor of the proposition, in substantially the words of the statute as to the manner of voting to express voter's intention.

Following this there was printed the words "for" and "against" the adoption of the act. We see nothing confusing or misleading in this, and the fact that a voter erased the

word "for" in the instruction rather than in the proper place, simply indicates that the voter did not read with required care his ballot before he prepared it for voting; if he had done so he would not have been misled.

The next point made is that there was no revision or correction of the election list used in the election.

The prosecutor offered no proof on this question, but insists that the burden is on the defendant to show that a public officer did comply with his duty. The performance of that duty was not within the power of the voter, and if it could avail the prosecutor in this proceeding he must show that the irregularity existed and was injurious; the presumption is that the public officer performed his duty in affording the voters an opportunity to express their wishes on the proposition submitted to them. What effect such a neglect, if it existed, would have in a direct contest against the result of the election, it is not necessary to now determine.

The next objection is that while the proposition received a majority of the votes cast, it did not receive a majority of the voters registered. This claim is so clearly against the words of the statute as to raise a doubt whether counsel has read it with reasonable care, for it only requires "a majority of those of the legal voters of such city who shall vote either for or against" the proposition. The Supreme Court adjudged that the proceedings of the city of Millville, declaring that the act of 1876 had been adopted, should be affirmed and that result we approve and affirm.

The respective writs in the other cases assail two ordinances, one providing for the acquisition by purchase or condemnation of the water plant of the Millville Water Company, and the issue of bonds to raise the amount of purchase price, or the award of commissioners if condemnation is had, and the other for a like purpose concerning the Peoples Water Company.

The objections to these ordinances are similar and numerous, but capable of segregation. One is that they are so unreasonable, inequitable and unfair as to amount to an abuse of authority on the part of the city. The principal basis for

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this claim is that the city now has a contract with the Millville Water Company sufficient for its needs, while the net revenue from both plants is not sufficient to pay expenses, and that the ordinances propose to meet the deficiency by taxation.

This, if true, does not amount to an abuse of authority nor render the proposed action of the city so unreasonable, inequitable and unfair as to justify a court of law in setting aside these proceedings. Every city which undertakes to acquire an existing water-supply plant, operating within its limits, is supposed to be supplied thereby, and the insufficient revenue may result from causes which the city can remedy.

In the present case it may result from ruinous competition between the two plants the city intends to acquire, and when properly operated at reasonable rates may become profitable, while on the other hand neither company is likely to long exist with an income not sufficient to maintain their operation and the city may find itself without any supply.

But whatever the situation of the property proposed to be taken may be in these particulars, the city is not estopped to acquire the plants, because it is now being supplied by them, or that the present cost of operation exceeds the income, and if it has the power to acquire, it also has power to raise by taxation the necessary cost of operation beyond revenue if such deficiency should exist, of which there is not and cannot be satisfactory proof in advance of operation by the city.

It is also urged that the bond issue provided for by these ordinances is illegal because not limited to a fixed sum.

As the city expected to acquire the properties by agreement, one for \$130,000 and the other for \$126,000, it was provided by these ordinances that bonds be issued not to exceed in each case the amounts above stated, and the prosecutor concedes that if the ordinances ended at this point the provision for the issue of bonds would be valid, but he claims that what follows renders the amount uncertain, and therefore the ordinances are not valid. We are of opinion that the prosecutor does not properly construe the ordinances. After providing for the issue of bonds as above set out, the ordinances read,

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"provided that the issue of additional bonds in any further sum shall be authorized by a supplemental or other ordinance if required for said purposes," that is, in case the agreed price or the award in condemnation proceedings shall exceed the respective amounts so provided for. This proviso prevents the issue of bonds to the amounts fixed by the ordinances if insufficient to provide for the cost of acquisition, unless such additional sum be authorized by ordinance as shall be required to meet the total cost. Additional bonds may never be required, but if they are then they must be provided for by ordinance, but so far as the present ordinances are concerned the amount is fixed, and the objection has no merit.

The last reason worthy of consideration is that the city, having entered into a contract for a supply of water with the Millville Water Company, it cannot abrogate that contract by the exercise of the right of eminent domain and the taking of its property. This contract is largely devoted to an explanation of the manner in which the plant should be installed, the rates to be charged, and that the city advance to the water company \$39,000, to be secured by a mortgage conditioned for the performance of the terms of the contract, and provides for an annual rent of \$50 for certain hydrants on extended lines, and also that the water company should have the exclusive right in perpetuity to lay and maintain its pipes in the streets of the city. Such a contract does not withdraw the property from the power of the state to exercise its right of eminent domain.

This precise question arose in the case of *Long Island Water-Supply Co. v. Brooklyn*, 166 U. S. 685; 17 Sup. Ct. Rep. 718, where the town of New Lots entered into a contract with the water company by which the latter agreed to construct the plant and supply the town with water, the town agreeing to pay for the use of fire hydrants. The town, with its obligations, was annexed to the city of Brooklyn, and the latter attempted to condemn the plant. One of the objections to the proceedings was that it was an impairment of the contract in violation of the federal constitution. In overruling this objection, Mr. Justice Brewer said, "The true view is

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that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses."

A contract between a water-supply company and a city to supply water to it is property, and may be condemned as an incident to the taking of the property for a public use, and the right of eminent domain may be exercised, if the power has been delegated by the contracting city, for such a proceeding does not impair the contract but appropriates it as property.

The judgments in each of the cases, to which the views above expressed relate, are affirmed, with costs.

For affirmance—THE CHANCELLOR, SWAYZE, PARKER, BERGEN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 9.

For reversal—None.

FRANK DONEY, APPELLANT, v. MORRIS COUNTY TRACTION COMPANY, RESPONDENT.

Submitted July 10, 1916—Decided November 20, 1916.

Where the plaintiff's case presents the fact that he was riding as a passenger upon the wagon of another, who performed the part of driver of a team of horses, attached to the wagon; that the wagon was struck at a road crossing in the evening by defendant's trolley car, propelled at a speed of from twenty to twenty-five miles an hour on a down grade; that the plaintiff knew nothing of the danger, because he was so seated upon the back of the wagon as to be ignorant of the situation; that the trolley car at the time the wagon approached within view of the crossing was several hundred feet distant, and gave no signal of its approach until it was within seventy-five feet of the crossing—*Held*, a nonsuit directed under the circumstances was error.

On appeal from the Supreme Court.

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For the appellant, *William C. Gebhardt*.

For the respondent, *King & Vogt*.

The opinion of the court was delivered by

MINTURN, J. A nonsuit was granted at the Circuit upon the following facts presented by the plaintiff's case: On a dark evening, while riding upon the wagon of another, who was driving a team of horses attached to the wagon along a public road, in the county of Morris, the wagon was struck at a cross-road by one of defendant's cars, proceeding down grade at a rapid rate of speed; and without giving any signal of its approach, the plaintiff, a boy nineteen years of age, received injuries from the collision which present the basis of his claim for damages in this suit.

At the time of the collision the plaintiff was seated upon the rear part of the wagon, and was so situated as to hide to some extent, at least, the view of the approaching car. The only intimation he received of the approach of the car was the glimmer of the headlight, which he was unable to distinguish in intensity or character from the light which might be emitted by an automobile coming from the opposite direction. To him personally the situation presented no indication of probable danger, and he trusted to the driver of the team to exercise the necessary care and caution required for the situation.

A witness, who was seated with the driver and therefore was in a position to observe and depict the situation, thus presents it: "The first that I heard of it (the car) was when it was very close on to us and we were on the track." He saw the car when the wagon was approaching the crossing, and at that time the car was several hundred feet away, and coming down grade at from twenty to twenty-five miles an hour. He thought they had sufficient time to cross or he would have left the wagon to avoid damage. That the car gave no signal of its approach until about seventy-five feet from the crossing, and at that time the wagon was on the track and the collision was inevitable.

In the situation thus depicted, the legal status of the plaintiff was that of a passenger, and the rule of law applicable thereto required him to use due care for his safety under the circumstances. *New York, Lake Erie and Western Railroad v. Steinbrenner*, 47 N. J. L. 161; *Consolidated Traction Co. v. Behr*, 59 *Id.* 477.

Assuming the negligence of the driver, it was not imputable to the plaintiff, and the extent of his legal responsibility is the exercise of due care under the circumstances; or, as was said by Mr. Justice Depue in the Steinbrenner case, "some co-operating negligence" on his part which resulted in his injury.

The driver of the wagon had reached the crossing first, when the trolley car was several hundred feet distant, and he therefore had a legal right to assume that having the right of way the defendant would so control the speed of its car as to avoid injury to the wagon and its occupants. *Rabinowitz v. Hawthorne*, *ante* p. 308.

We find nothing of a character so clearly culpable in the plaintiff's conduct in this case as to charge him as a court question with contributory negligence.

The books are replete with road crossing cases, wherein this court has determined the rule to be, that where the case upon the entire evidence presents a debatable question of fact, as to the existence of contributory negligence, the issue is one for the jury. *Zindler v. Public Service Railway Co.*, 78 N. J. L. 536; *Quinn v. West Jersey Railway Co.*, *Id.* 539; *Bradley v. Central Railroad of New Jersey*, 84 *Id.* 357; *Peterpolo v. Public Service Railway Co.*, 81 *Id.* 390; *Napodensky v. West Jersey Railroad Co.*, 85 *Id.* 336; *Snackenberg v. Delaware, Lackawanna and Western Railroad*, *ante* p. 311; *Rabinowitz v. Hawthorne*, *supra*.

A fortiori must this well-settled rule be applied, where, as in the case *sub judice*, the facts upon the *ex parte* proof of the plaintiff stand uncontroverted, and any deduction to be drawn therefrom must necessarily present a question of fact resolvable only by the jury.

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The judgment will be reversed and a *venire de novo* will be awarded.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, JJ. 13.

AMZI G. SMITH, RESPONDENT, v. THE DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COMPANY,
APPELLANT.

JOHN H. ORT, RESPONDENT, v. THE DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COMPANY,
APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

Where the testimony of the plaintiffs presented a case from which the jury might reasonably infer that the destruction of the plaintiffs' timber land was due to a fire which originated in an accumulation of combustible matter upon defendant's right of way, ignited by defendant's locomotive, and the defendant presented proof to show that its engine was provided with the latest and most approved methods of arresting sparks and preventing fires, it was not error for the court to refuse to charge in effect that the care thus exercised by defendant relieved it of liability, or that the care it exercised in the supervision of its roadbed and right of way in effect exempted it from liability, since those questions presented the issue in the case and were for the determination of the jury.

On two appeals from the Morris County Circuit Court.

For the respondents, *William C. Gebhardt*.

For the appellant, *Frederic B. Scott*.

The opinion of the court was delivered by

MINTURN, J. The two cases were tried together, and involved the liability of the railroad company, for the damage resulting from a fire, which consumed and destroyed the plaintiffs' timber lands, in the township of Mount Olive, in the county of Morris.

Having introduced testimony from which the jury might infer that the damage was caused by fire emitted from the defendant's locomotive, which settled upon the defendant's right of way, and then ignited leaves, grass or other combustible matter, and eventually spread to the property of these plaintiffs, causing the damage complained of, the plaintiffs, after submitting proof of the damage, rested their cases.

The defendant met the case thus presented with proof tending to show that the right of way was clear of combustible material, and that the screen in use upon the engine was of a standard type in common use among railroads at the time, and was the product of the most recent experience in that line of human endeavor; that the screen and ash pans were in good condition, and that even the most approved type of screen could not be made absolutely spark proof while an engine was in course of successful and practical operation.

The defendant then moved for the direction of a verdict in its favor upon two grounds, the refusal of which by the trial court presents the basis of this appeal.

The court was requested to direct the jury in the language of the request as follows: "That the defendant, in the words of the statute, having adopted all practical means to prevent the communication of fire from its engine, such evidence rebuts the *prima facie* case of the plaintiffs, that the injury was communicated from an engine, in violation of the statute; and this, irrespective of the credibility of its witnesses on said subject, or the matter of the preponderance of the evidence. In view of which facts the *prima facie* case of the plaintiffs had been rebutted."

The second request was as follows: "That the uncontradicted evidence in the case showed that the defendant took all practicable means to prevent the communication of injury

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to the plaintiffs' property, by the escape of fire from its engine, which is evidenced by having installed in said engine a screen or spark arrester of common design, in general use and approved by experience, and having taken reasonable care to keep its lands free from combustible material."

The inherent defect of the defendant's contention, contained in the first request, is, that it, in effect, assumes the right of the court to usurp the function of the jury in determining the very fact in issue, *i. e.*, whether the defendant used due care to keep its right of way free from combustible material. The inquiry presented the gravamen of the case. The request also assumed as a legal proposition that because the proof upon the part of the defendant tended to show a *ne plus ultra* condition of its locomotive and appliances, damage resulting to the plaintiffs from a fire originating upon the defendant's right of way, was *damnum absque injuria* and placed the defendant beyond the zone of culpability and responsibility.

The question thus presented is not *de novo* in this court. It was exhaustively and learnedly considered by Mr. Justice Depue in the case of *Delaware, Lackawanna and Western Railroad Co. v. Salmon*, 39 N. J. L. 299, where it was declared that a railroad company is bound to keep its tracks free from combustible matter, whereby fire may be communicated from its locomotives to adjoining property, even though there was no allegation that the engine from which the coals were dropped or thrown was improperly constructed or driven.

The second request was not dealt with in the briefs, and may therefore be considered as abandoned. It presents no concrete legal proposition for the consideration of the court, but contains a congerie of facts which the defendant would have the trial court assume as proved or admitted. It assumes, as its major premise, that "the uncontradicted evidence in the case," *inter alia*, demonstrated that the defendant had "taken reasonable care to keep its lands free from combustible material."

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It will be observed that the request was tantamount to declaring that the plaintiff has failed to make a *prima facie* case; and that the issue of fact presented by the pleadings and the testimony must be accepted by the jury, from the viewpoint of the defendant, so as to acquit it of the charge of tort-feasance in the care and management of its right of way. Manifestly, the consideration of that fact was for the jury, and the trial court was correct in so dealing with it.

The argument of counsel for the defendant makes it apparent that what he desired the trial court to charge was that if the jury should find that the spark which was emitted by the locomotive passed direct to the plaintiffs' land and caused the fire, their verdict, in view of the testimony of the witnesses for defendant (that under the most perfect conditions a spark could escape through the screen and inflict damage if it should light direct upon the plaintiffs' land), must be for the defendant.

This, however, the court was not requested to charge. The request that was made did not eliminate the intermediate contributing factor of the defendant's right of way, and the possibility that the fire might have originated thereon, which, as we have pointed out, was clearly a jury question. We express no opinion as to the soundness of the abstract proposition which counsel has thus presented which, as we have shown, forms no part of the concrete case before us.

The judgment will be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 14.

For reversal—None.

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THE STATE OF NEW JERSEY, PLAINTIFF IN ERROR, v.
GEORGE M. BREWSTER, DEFENDANT IN ERROR.

Argued June 20, 21, 1916—Decided December 4, 1916.

1. Process to appear before a legislative committee, regular on its face, issued by the chairman of such committee under a general authority conferred upon him by the committee, either expressly or by parliamentary usage, and either with or without specific authority in the particular case, is a summons to appear before such committee, the willful disregard of which is made a misdemeanor by *Pamph. L.* 1895, p. 162. *Comp. Stat.*, p. 2241, §§ 67, 68.
2. The failure of the defendants to appear at the place named in the subpoena was the culminating factor in the completion of their offence, and the defendants were then subject to indictment in that county, though they resided elsewhere. *Quære*: Whether such process is subject to collateral attack?

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 551.

For the state, *Martin P. Devlin* and *Charles H. English*.

For the defendant in error, *William B. Mackay, Jr.*, and *Gilbert Collins*.

The opinion of the court was delivered by

MINTURN, J. In the session of the year 1914 the legislature passed a resolution empowering and authorizing the joint appropriations committee to investigate the expenditure of state moneys, with reference particularly to the departments of education, public roads and charities and corrections, and to report at the following session of the legislature.

The resolution empowered the committee to issue subpoenas for the attendance of witnesses, and to sit after the adjournment of the legislature at any place in the state which they might designate.

Pursuant to the mandate of this resolution, the committee sat on the 5th day of December, 1914, in the senate chamber, in Trenton, for the purpose, *inter alia*, of taking the testimony of George M. Brewster and Walter Scott, the defendants, to whom had been previously issued subpoenas in due form, commanding them, respectively, to appear before that body, upon that day, at eleven o'clock in the forenoon. Instead of appearing in person, the defendants appeared by counsel, who informed the committee that he had advised the witnesses not to appear, because, as he conceived, the committee lacked the power to require the witnesses to appear.

The failure of the defendants to appear resulted in their indictment by the Mercer county grand jury, and their trial and conviction by the Mercer Sessions, from which judgment a writ of error was taken to the Supreme Court, where the judgment of conviction was reversed. The legal correctness of this reversal is before us upon this writ of error.

Prior to the trial, a motion to quash the indictment was made and refused by the Supreme Court. *State v. Brewster*, 87 N. J. L. 75; 93 Atl. Rep. 189.

The indictment is based upon the violation of the provisions of the act entitled "An act respecting the examination of witnesses before legislative committees, and providing for the punishment of witnesses refusing or neglecting to appear or give evidence before such committees." 2 *Comp. Stat.*, p. 2241, §§ 67, 68; *Pamph. L.* 1895, p. 162.

The first section of the act deals generally with the obligations of witnesses, testifying before either house of the legislature, or any authorized committee of either house. The second section concerns the situation presented by this inquiry, viz.: "That if any witness summoned to appear before any such committee shall willfully neglect or refuse to appear in obedience to the summons, or shall refuse to be sworn or affirmed, he shall be deemed guilty of a misdemeanor."

The case came before the Supreme Court under the one hundred and thirty-sixth section of the Criminal Procedure act, and was there argued on the exceptions taken at the trial,

and the specifications of causes filed and served upon the state, in accordance with the provisions of the one hundred and thirty-seventh section of the act.

It is insisted here by the state that in dealing with the case, the Supreme Court supported its judgment upon a question not raised by the bill of exceptions, or by the specifications, and therefore upon a point not argued by either side in that court.

It must suffice to say, in answer to this contention, that in view of the public importance of the questions in controversy, and in view of the generality of the assignments and reasons presented by the defendants for reversal, we are not inclined to base our determination upon a severely rigorous adherence to any rule of judicial procedure.

The Supreme Court based its determination upon two grounds—*first*, that no place of meeting was designated by the committee, and *secondly*, that the committee never authorized the issuing of a summons to the defendants.

The questions argued by the defendants we shall consider in their order of presentation.

It is insisted, primarily, that there was no joint appropriations committee of the legislature for the year 1914, as alleged in the indictment. The Supreme Court quite aptly disposed of this contention by deciding that the facts showed that there was a committee on appropriations, appointed for each house, and that together they acted as and constituted a joint appropriations committee.

We might go further and declare that the courts will take judicial notice of the fact that the joint appropriations committee constitutes the *modus operandi*, under legislative practice, for the consideration and determination of both the propriety and *quantum* of the appropriations annually made by the legislature to each department of the state government; and that if such a committee did not in fact exist in the year 1914, the onus of showing that fact was upon the defendants and not upon the state of proving it affirmatively. 1 *Greenl. Ev.* 8; 2 *Rice Ev.* 35; 16 *Cyc.* 907, and cases.

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It is further contended that no place of meeting was designated by the committee. The joint resolution conferred power upon the committee "to sit at any place in this state which they may designate."

In pursuance of that power they sat at Trenton, and the process served upon the defendants required them to appear there.

The record shows that the committee met at Trenton, upon the return day of the subpoena, and that the defendants failed to appear. It may be that the minutes do not show any record of adjourned meetings from place to place, or even any resolution to convene at Trenton. The committee were acting under parliamentary rules and usages, and it was within the power of the chairman to convene them at Trenton, or elsewhere within the state, in the absence of a continuing resolution fixing the place of meeting. *Cush. Prac. Leg. Assem.* 739.

It is contended, also, that no offence was committed in Mercer county, since the defendants were served with process in Bergen county. Upon that subject we desire to add nothing to what has been stated by the Supreme Court, in the opinion of Mr. Justice Bergen, on the motion to quash the indictment. *State v. Brewster, supra.*

The *ratio decidendi* was "that the place of service is not material, for the offence was not complete until refusal to appear and be sworn at the place named in the summons." *Noyes v. State*, 41 N. J. L. 418.

The final and most serious contention of the defendants is that upon which the Supreme Court based its reversal of the judgment, *i. e.*, "the committee never authorized the issue of summons to the plaintiffs in error."

In this the court below fell into error. The summons was admittedly issued by the chairman of the committee, and if it were necessary to rest our decision of the case upon the power of the chairman to issue the process, it might be insisted, as a matter of judicial knowledge, that the practice has been quite general in the conduct of legislative investigations, for the chairman of the committee, in conjunction with

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its counsel, to select the names and the number of witnesses, for attendance at each session, and for the chairman to sign the summons for each witness when presented to him by counsel for the committee.

It is laid down by Cushing that where the power exists in the committee "any witness may be summoned by the chairman to appear before the committee and to bring with him all such documents as he may be directed to bring for the use of the committee." *Prac. Leg. Assem.* 739.

The federal congress, acting upon this principle in 1837, sustained the service of a subpoena signed by the chairman of the committee, in the case of Reuben F. Whitney, which was thus challenged. A similar exercise of power by the chairman was sustained by congress, in the case of the investigation of the Bank of the United States, at Philadelphia, during the administration of President Jackson. 2 *Hurd Prec.* 4540.

But we find that the record in the case furnishes ample support for the claim that the action of the chairman, in this particular, had not only the cognizance of the committee but also its assent.

At page 48 of the case, Senator Hennessy, the chairman of the committee, testified: "My recollection is that the committee discussed at more than one session, informally, they discussed the question of issuing subpoenas for these witnesses. I have no recollection of a specific meeting. I cannot, specifically, recall a meeting at which specific authority was issued for this purpose. The understanding was that the chairman of the committee issue the subpoenas."

At page 49 of the record he reiterates: "These matters were discussed, informally, and my recollection is that an agreement was in each case arrived at as to what witnesses were to be subpoenaed."

This authority was subsequently recognized, supplemented and ratified by the resolution of the committee, requiring the arrest of the defendants, the preamble of which recites: "Whereas, by order of this committee, George M. Brewster and Walter Scott have been summoned to appear, &c., by summons in writing," &c.

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The authority of the committee to sit and investigate was derived from the joint resolution which, for its purposes, voiced the will of the law-making body, and not from any prior legislation, bearing generally upon the powers of legislative committees. Sections 63 and 64 of "An act concerning evidence" (*Pamph. L. 1875, p. 26; 2 Comp. Stat., pp. 2217, 2239*), may well be considered as a standing enactment, in aid of legislative committees appointed, as is sometimes the case, without specified powers contained in the appointing resolution.

Auxiliary legislation of that character, in such a situation, is then necessary for the purpose of executing the legislative will. Twenty years after the passage of that act, it was found necessary to enact the statute of 1895, manifestly in furtherance of a legislative policy of facilitating investigations, and of expeditiously pursuing contumacious witnesses; and of obviating the delay incident to a prosecution at the legislative bar, as well as to empower the courts to deal with the offence in a manner practically as summary as it might be dealt with under parliamentary rules, and upon evidence substantially similar to that which, under established parliamentary precedents, and the rules of evidence, would result in invoking the legislative judgment.

From these considerations we conclude that the process which was served upon the defendants was the summons of the legislative committee, the willful disregard of which constitutes the misdemeanor created by the statute, to which reference has been made.

We have not overlooked the fact that there is a more fundamental inquiry presented by the case, which may be broadly stated to be, whether the process of a legislative committee can be attacked or inquired into collaterally by one who has disobeyed its mandate.

It has been held that a witness who appears in obedience to a subpoena from such a body cannot question the committee's power to issue it, and *a fortiori* cannot *aliunde* show that the process was not in fact issued by the committee. *Wilckens v. Willet*, 1 *Keyes* (N. Y.) 521; *Lowe v. Summers*, 69 *Mo.*

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App. 637; *Ex parte McCarthy*, 29 Cal. 395; 40 Cyc. 2196, and cases cited.

Upon grounds of public policy, based fundamentally upon *argumentum ab inconvenienti*, courts have not tolerated the setting up of the judgment of the witness, as to the necessity for his attendance, or as to the legality of the committee, for the purpose of excusing his non-attendance.

So, a witness cannot excuse his failure to attend on the ground that the pleadings in the case are insufficient. *Fairfield v. United States*, 146 Fed. Rep. 508; 76 C. C. A. 590.

Or that the testimony is immaterial or irrelevant. *Robb v. McDonald*, 29 Iowa 330; *Deadman v. Ewen*, 27 U. C. Q. B. 176; *Mitchell's Case*, 12 Abb. Pr. (N. Y.) 249; 40 Cyc. 2176, and cases.

The rationale of the doctrine was emphatically expressed as follows by Lord Erskine in *Burdett v. Colman*, 14 East 163; also 5 Dow Parl. Rep. 165, 202. The case presented the parliamentary proceedings against Sir Francis Burdett, who was charged with uttering a libel against the house of commons. "The House of Commons, whether a Court or not, must, like every other tribunal, have the power to protect itself from obstruction and insult, and to maintain its dignity and character. If the dignity of the law is not sustained, its sun is set, never to be lighted up again." To the same effect is *Burdett v. Abbott*, 14 East 1.

In the case of *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, which was an action of trespass against the sergeant-at-arms of the house of representatives for false imprisonment, executed in pursuance of a resolution of the house for a contempt of its rules and dignity, the then Attorney-General Wirt argued that "the necessity of self-defence is as incidental to legislative, as to judicial authority.

"This power is not a substantive provision of the common law adopted by us; it is rather a principle of universal law growing out of the natural right of self-defence belonging to all persons. The general grant of judicial powers to the courts of the United States does not exclude the other branches of the government from the exercise of certain portions of judi-

cial authority. The different departments of the government could not be divided in this exact, artificial manner. They all run into each other. Even the president, though his functions are principally executive, has a portion of legislative power; and the congress is invested with certain portions of judicial power. * * * A legislative body has, from the necessity of the case, a right to commit persons for contempt, in breach of their privileges; that they are the exclusive judges whether those privileges have been violated, in the particular instance; and that their decisions upon the subject cannot be questioned in any other court or place."

The Supreme Court, in that case, emphasized the legal correctness of these views by declaring: "If there is one maxim which necessarily rides over all others, in the practical application of government, it is that the public functionaries must be left at liberty to exercise powers which the people have entrusted to them."

To the same effect, see *Falvey v. Massing*, 7 Wis. 630, and *Ex parte Nugent*, 4 Pa. L. J. Rep. 220, District of Columbia.

In *Kilbourn v. Thompson*, 103 U. S. 168, the United States Supreme Court, in 1880, is supposed to question the broad liberality of the opinion in *Anderson v. Dunn*, *supra*, but the limitation, if any, imposed by the later decision, is that contained in this language of the opinion of Mr. Justice Miller, by which it is made obvious that the case there *sub judice*, was determined only upon the consideration that "the whole plea shows the house was without authority in the matter." That such was the only differentiation is made clear by the language of Chief Justice Fuller in *In re Chapman*, 166 U. S. 661. There the question was in some respects identical with that presented in the case at bar. The defendant was indicted and convicted, under U. S. Rev. Stat., p. 102, for refusing to testify before a committee of the United States senate. The learned Chief Justice there held that *Kilbourn v. Thompson* was authority for the proposition "that there exists no general power in congress, or in either house, to make inquiry into the private affairs of a citizen." But, he

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declared, "the refusal to answer pertinent questions in a matter of inquiry, within the jurisdiction of the senate, of course, constitutes a contempt of that body, and by the statute this is also made an offence against the United States."

The question of authority of the investigating committee manifestly, therefore, was resolved into a question of the jurisdiction of the appointing body, and the rule enunciated in *Anderson v. Dunn* remained unshaken, so that process possessing all the *indicia* of regularity issued by a legislative committee could not be attacked or questioned by a refractory witness for matters *aliunde*.

It must be perceived, that like any other legislative enactment, the joint resolution of the legislature, and its necessary legal incidents, are impregnable against collateral attack, and that it is the duty of co-ordinate branches of government to presume that the legislature, and its committee, invested with *quasi-judicial* powers, have acted within their legitimate scope and province, until the contrary be made to appear by strong and convincing reasons. *State v. Philips* (*Supreme Court, Maine*), 78 *Atl. Rep.* 283.

"It is but a decent respect," said the United States Supreme Court in *Ogden v. Saunders*, 12 *Wheat.* 213, 270, "due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation is proved beyond all reasonable doubt."

Whether this immunity from collateral attack is so intimately connected with the absence of appeal that it applies only to the action of the legislative body itself, or whether it can be applied to the same subject-matter when cast in the form of an indictable misdemeanor, to be dealt with by the ordinary courts of law, are questions, the decision of which are not essential to the determination of the case now before the court.

For the reasons given the judgment of the Supreme Court will be reversed and the judgment of the Mercer Sessions will be affirmed.

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For affirmance—None.

For reversal—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

WALTER CLIVER, PLAINTIFF-APPELLANT, v. ALEXANDER HARRIS, DEFENDANT-RESPONDENT.

Argued June 26, 1916—Decided November 20, 1916.

A party who purchases a crop of grain can acquire no better or different title thereto than the seller had at the time of the sale.

On appeal from the Burlington Circuit Court.

For the appellant, *V. Claude Palmer*.

For the respondent, *James Mercer Davis*.

The opinion of the court was delivered by

KALISCH, J. This case was tried together with the case of Emma O'Leary, administratrix, against the same defendant, at the Burlington Circuit, and a verdict was directed for the defendant.

The plaintiff's action was for trover and conversion against the defendant to recover the value of twenty acres of growing grain which the plaintiff bought from Mrs. O'Leary in March, 1915, and which crop of grain the defendant, in July, 1915, refused to let the plaintiff reap, and appropriated the same to his own use.

The facts are fully set forth in an opinion filed, in the case of *Emma O'Leary, Administratrix, v. Alexander Harris*, post p. 671, at the present term of court, and in which case we

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reached the conclusion that Mrs. O'Leary had no title to the crop of grain.

In the case *sub judice* the plaintiff's right to a recovery depended solely upon the title of Mrs. O'Leary to the grain, since the plaintiff claimed to have bought the crop of grain from her, and as she had no title thereto, of course, the plaintiff could not have acquired any by such purchase, and hence the verdict in favor of the defendant was properly directed.

The judgment will be affirmed, with costs.

WHITE, J. (dissenting). I am unable to agree that there was a "surrender" of the tenancy in this case. In January, 1915, the landlord received and receipted for the rent for the current year ending in March, 1915, and agreed with the tenant that the portion of the lease for the balance of the term after that year should be canceled. It is said that this was a "surrender." I think not. I think it was a contract changing the lease from one for three years to one for one year. The tenant did not give up possession to the landlord in January when the agreement was executed, but in March at the end of the term of the lease as thus changed. Can it be doubted that she held possession during this time from January to March as a tenant under that lease, or that if in March she had refused to give up possession to the landlord she could have been summarily dispossessed under the Landlord and Tenant law as upon the termination of her term at that time? I think not. This leads me to the view that at the end of the one-year term under the modified lease she was entitled to emblements just the same as she would have been at the end of the three-year term if the lease had not been changed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 13.

For reversal—WHITE, J. 1.

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CYRINE DERONET, PLAINTIFF-RESPONDENT, v. F. W. WOOLWORTH COMPANY, DEFENDANT-APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

Plaintiff, a middle-aged woman, entered defendant's store to make purchases, and while following one of the saleswomen to the place where a desired article was, fell down a pair of stairs, which she did not see and of the existence of which she had no knowledge. Since under the evidence it was permissible for the jury to draw either of two inferences, that the saleswoman, in passing, opened the gate leading to the stairs to let the plaintiff follow her, or that the gate was found open and left so by the saleswoman, the question whether the defendant exercised reasonable care to keep and maintain its store in a reasonably safe condition, and the question whether the plaintiff used reasonable care for her own safety, were jury questions.

On appeal from the Supreme Court.

For the appellant, *M. Casewell Heine*.

For the respondent, *Albert Leuly*.

The opinion of the court was delivered by

KALISCH, J. The appeal in this case presents the single question whether there was any evidence warranting the submission of the case to the jury. The gravamen of the action was negligence of the defendant. The plaintiff recovered a verdict against the defendant in the court below, and it is the judgment entered upon that verdict which is before us for review.

The plaintiff, a middle-aged woman, entered the defendant's store to make some purchases. She had bought a few articles and was seeking to buy a five-pound sugar box. She was asked by the saleswoman, who waited upon her, to point out the box, and the saleswoman, walking slightly in advance of the plaintiff, and followed by the latter, walked through an open space between two railings, the plaintiff still following, and at the

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same time pointing to a sugar box on a shelf against the wall of the store, and while the plaintiff was doing this, she fell down a flight of stairs which she did not see and of the existence of which she had no warning. The evidence shows that the opening of the stairway was flush with the floor, and that the opening between the rails through which the saleswoman and the plaintiff passed on their way to the sugar box was protected by a gate, which opened and shut by a spring lock, to prevent persons, not connected with the store, from going onto the floor space beyond it.

The plaintiff testified that when she was brought upstairs after her fall she saw a gate across the opening through which she and the saleswoman had passed and that the gate was then shut. The saleswoman was not called as a witness.

As the evidence then stood it was permissible for the jury to draw either of two inferences, that the saleswoman in passing opened the gate to let the plaintiff follow her in order to point out the sugar box, or that the gate was found open and left so by the saleswoman in order that the plaintiff could follow her for the purpose stated.

We think there was evidence, though meagre, yet sufficient, from which a jury might properly have found that the saleswoman, by her conduct, invited the plaintiff to the spot where the latter met with her mishap.

The question whether the defendant exercised reasonable care to keep and maintain its store in a reasonably safe condition, and the question whether the plaintiff used reasonable care for her own safety were, under the evidence, jury questions and were properly submitted to them.

The judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

For reversal—None.

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O'Leary v. Harris.

EMMA O'LEARY, ADMINISTRATRIX, PLAINTIFF-APPELLANT, v. ALEXANDER HARRIS, DEFENDANT-RESPONDENT.

Argued June 26, 1916—Decided November 20, 1916.

The well-settled law that upon the termination of a tenancy by its own limitation or by voluntary act of the tenant, in the absence of a special custom, there is no right of emblements, applies as well to tenancies which have been terminated between seed time and harvest with the consent of the landlord.

On appeal from the Burlington Circuit Court.

For the appellant, *V. Claude Palmer*.

For the respondent, *James Mercer Davis*.

The opinion of the court was delivered by

KALISCH, J. This is an appeal from a judgment entered upon a verdict directed by the trial judge of the Burlington Circuit Court in favor of the defendant-respondent.

The plaintiff, as administratrix of John J. O'Leary, Jr., deceased, brought her action in the court below for trover and conversion against the defendant to recover the value of growing grain which the plaintiff claimed belonged to her as outgoing tenant.

The defendant, by his answer, denied that the plaintiff had any property in the growing grain, and also set up that by the lease under which the plaintiff's decedent held the premises, the latter had agreed to leave as much growing grain as he found thereon upon his going into possession; and the defendant also set up a custom in the renting of farms that the tenant shall leave as much growing grain upon the premises as he found at the beginning of the term.

The defendant in addition thereto set up, by way of counterclaim, an indebtedness of the plaintiff's decedent to him in the amount of \$581.54, which appears to have been undis-

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puted at the trial and for which sum a verdict was directed in favor of the defendant and against the plaintiff by the trial judge.

The issues raised by the defendant's answer denote that they involved mixed questions of law and fact, and since it appears upon examination of the evidence in the cause that the facts were not in dispute, there only remains to be examined whether the legal rules applicable to the facts were properly applied.

The respondent, Harris, was the owner of a farm called the "Cooper Farm." He leased the farm to John O'Leary, Jr., in January, 1909, for five years. In December, 1913, he renewed the lease for a term commencing March 25th, 1914, for the term of three years. This lease contained the clause following:

"And the said party of the second part hereby covenants that no cornstalks or wheat straw shall be sold or removed from said premises during said term; and that he will not sow over twenty acres in grain in the fall, and if he does sow over twenty acres, that all over twenty acres shall be left on said farm for the benefit of the said party of the first part." The lease contained the further clause: "And it is agreed that if any rent shall be due and unpaid, or if any default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom." During the term of the second lease, in November, 1914, O'Leary, the lessee, died, and the plaintiff-appellant was appointed administratrix.

On the 11th day of January, 1915, the administratrix surrendered the lease to the defendant-respondent, and the following endorsement was made on the lease:

"MT. HOLLY, N. J., January 11th, 1915.

"Received of Emma M. O'Leary, administratrix of John O'Leary, deceased, the sum of \$1,068 in full of rent due on the within lease for the year ending March 25th, 1915, and

the within lease is hereby by consent of parties canceled as to the balance of the term thereof. The within settlement being made without any prejudice as to any claims of Emma M. O'Leary as administratrix against Alexander Harris."

This writing was subscribed by Alexander Harris, the defendant. This is not such a surrender in writing as is contemplated by section 2 of the act for the prevention of frauds and perjuries (2 *Comp. Stat.*, p. 2610), which statute requires that the deed or note in writing assigning, granting or surrendering any lease, &c., shall be signed by the party so assigning, granting or surrendering the same or his, her or their agent or agents thereunto lawfully authorized. But this writing was evidently followed by an actual surrender by operation of law, for Mrs. O'Leary went out of possession and there was an auction sale of the farm chattels. She sold to one Cliver twenty acres of the grain and left nine acres unsold.

When the harvest time came, in July, 1915, the plaintiff, Mrs. O'Leary, went to the Cooper farm to harvest the grain on the nine acres unsold, but was prevented from doing so by the defendant, who appropriated the grain to his own use.

The appellant asserts her right to recover for the nine acres of growing grain upon the language in the writing signed by respondent, as follows: "The within settlement being made without any prejudice as to any claims of Emma M. O'Leary as administratrix against Alexander Harris." We are asked to give this language the effect of a reservation by Mrs. O'Leary of the growing grain on the farm.

The argument advanced by counsel for appellant to sustain this contention is, that at the time the agreement was entered into between the parties there were several matters in dispute between them. But a reference to the writing alluded to shows nothing more than that the appellant paid to the respondent a certain sum of money which was to be in full satisfaction of what was owing on the lease and for the cancellation of the lease for the remainder of the term after March 25th, 1915. We think that so important a matter as a reservation of a right by the appellant to harvest twenty-nine acres

of grain, if it was intended that that right should be reserved, notwithstanding the cancellation of the lease and surrender of the premises, would most likely have been mentioned in the agreement.

The amount paid by the appellant, in settlement of the rent already accrued, and to relieve herself from the burden of continuing the maintenance of the farm, must be considered to have comprised all the pecuniary elements which formed the basis of inducing the landlord to cancel the lease and the tenant to go quit of any further obligation thereunder.

The insistence, therefore, of counsel for appellant that the words in the agreement, "without any prejudice as to any claims of Emma O'Leary against Alexander Harris," was a reservation of a right to a growing crop is clearly untenable. It was only claims which were not to be prejudiced, and it cannot be properly said that the right to gather the crop was reserved in any such terms as such a reservation requires.

Aside from the contention of counsel for appellant that the right to gather the growing crop was reserved by the tenant in the agreement, he also urges that by operation of law the plaintiff was entitled to gather the crop, because the abandonment of the premises was the result of an agreement between her, as tenant, and her landlord—the joint act of both—and that in order to debar an outgoing tenant who has determined the estate between seed time and harvest, as in this case, it must be the result of her act alone, and not as the result of an agreement with her landlord.

We find no such distinction taken at common law or in the cases referred to on that subject. On the contrary, the law appears to be well settled that upon the termination of a term by its own limitation in the absence of a special custom or by voluntary act of the tenant, there is no right of emblements. *Debow v. Colfax*, 10 N. J. L. 128; *Howell v. Schenck*, 24 Id. 89; 24 Cyc. 1071. The tenant's act is no less voluntary because it is acquiesced in by the landlord.

The undisputed fact in the present case is that the plaintiff determined the tenancy between seed time and harvest, with

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the consent of her landlord, and, as a legal result flowing from her own act, she forfeited her right to emblements.

This view leads to the conclusion that the verdict was properly directed in favor of the defendant, and, therefore, makes it unnecessary to consider the other grounds of appeal.

The judgment will be affirmed, with costs.

WHITE, J. (concurring). My vote for affirmance in this case is based solely upon the clause of the lease which provided that if the tenant planted over twenty acres of grain, all over that amount should be left on the premises as the property of the landlord. The nine acres here involved fall within this provision.

For the reasons stated in a memorandum which I will file in No. 74, June term, 1916, where the twenty acres are involved, I dissent from the opinion of the court in the present case.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

WILLIAM I. PUSEY, PLAINTIFF-RESPONDENT, v. CHARLES R. MOORE, DEFENDANT-APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

Where there was testimony to show that defendant offered plaintiff \$75 a month to work for him as manager of a hotel, and that for a period of time thereafter the plaintiff performed the services of manager, the trial judge was warranted in finding that the plaintiff had accepted the offer of the defendant and had performed services under an express contract.

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On appeal from the Supreme Court.

For the appellant, *Clarence L. Cole*.

For the respondent, *Irving P. Parsons*.

The opinion of the court was delivered by

KALISCH, J. The question mooted on this appeal from the Supreme Court, and which was raised in the former court and in the District Court of Atlantic City where the action was originally brought, is, whether or not there was any evidence before the trial judge that warranted a finding by him that the contract upon which the respondent sued and recovered a judgment against appellant in the District Court, was accepted by the respondent.

The state of the case agreed upon between the parties shows that the respondent's original action against appellant was for work and labor performed by him for the appellant, as set forth in the state of demand and which is referred to as a part of the state of the case.

The state of demand discloses that the respondent's action was founded on his claim for services rendered by him, for the appellant, from July 24th, 1914, to September 24th, 1914, and which services the respondent claimed were reasonably worth \$150.

The state of the case then contains this language: "During the course of the trial, plaintiff, in order to have his proof and allegation in harmony, moved to amend his demand by setting up an express contract; which motion was allowed," &c. The amended state of demand, also, made part of the state of the case, sets forth that the respondent claims wages due him as manager of the respondent's hotel from the 28th day of July, 1914, to the 28th day of September, 1914, at \$75 a month, pursuant to an agreement made with the appellant, whereby the appellant agreed to pay the respondent that amount or more if the business warranted it.

The state of the case further discloses that a few days prior to July 28th, 1914, the respondent was a boarder and lodger at appellant's hotel at appellant's request, and that on the 27th day of July, 1914, in a conversation had by the respondent with appellant, the appellant told respondent that things were not going right in the hotel and that he was not doing any business and that he, appellant, needed somebody to manage the place, whereupon the following colloquy between them took place: "I (respondent) told Mr. Moore I have an offer now of \$75 a month and board, and I says I will pay you for my room and board. Mr. Moore, he says, 'Pusey, you stick by me; I will do better than that for you; I want some man to run this place for me.' He also said, 'You stick by me and I will give you \$75 a month or more if the business warrants it.'" The state of the case then continues: "The defendant denied that there was any contract between him and the plaintiff, except that he had promised to give plaintiff board and lodging so long as he remained with him." From this it has been argued for the appellant that because preceding the recitation of the plaintiff's testimony in the District Court above set forth, there is the statement that that testimony is the only testimony in support of the claim of an express contract that we are bound by that statement, and are to assume that there was no testimony to the effect that the respondent had accepted the terms offered him by the appellant and entered upon the performance of them. This contention is without merit. The entire record of the District Court is before us. As has been pointed out the agreed state of the case made the original state of demand and the amended state of demand a part of it. The state of the case inferentially shows that the plaintiff in the District Court made proof under his original state of demand and by reference to the original state of demand we find that the plaintiff claimed for services actually performed by him for the appellant between July 28th, 1914, and September 28th, 1914, but as he founded his claim on a *quantum meruit*, whereas it appeared from the proof that there was a contract, the original state

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of demand was amended, "in order to have his proof and allegation in harmony," as stated in the agreed state of the case.

In order to ascertain what the plaintiff's proof was under the original state of demand we must turn to the amended one, which, according to the agreed state of the case, embodies the allegations conformable to the proof under the original, and from which amended state of demand it appears that the respondent acted as manager of appellant's hotel for two months under an agreement that the respondent was to receive \$75 a month, or more from the appellant, if business warranted it, and that the appellant promised to pay.

We think, therefore, there was proof warranting the finding of the trial judge that there was an express contract and that the respondent had performed services for the appellant under it.

Judgment of the Supreme Court will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 10.

For reversal—PARKER, BERGEN, JJ. 2.

THE STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
FREDERICK KOETTGEN, PLAINTIFF IN ERROR.

Submitted March 27, 1916—Decided November 20, 1916.

1. The habitual violation of the statute making it a misdemeanor to sell or give intoxicating liquors to minors under the age of eighteen years, constitutes the place where such sales take place a disorderly house.

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2. The fact of age is not within the category of things as to which the fact can be proven by opinion testimony, since such evidence is not the best proof of which the fact of age is susceptible.
3. In a criminal trial counsel will not be permitted to sit by in silence and let incompetent evidence be introduced, cross-examine on and experiment with it, and at the close of the state's case, finding it to his disadvantage to have such testimony in the case, move that it be stricken out, and a refusal by the trial court, under such circumstances, to strike out such incompetent testimony is not reversible error.
4. Where a general exception is taken to the court's charge, and error assigned on a portion thereof, which includes two distinct propositions of law, one sound and the other unsound, the assignment is ineffectual and will not be considered on a strict bill of exceptions.

On error to the Supreme Court, whose opinion is reported in 88 N. J. L. 51.

For the plaintiff in error, *Ward & McGinnis*.

For the state, *Michael Dunn*, prosecutor of the pleas.

The opinion of the court was delivered by

KALISCH, J. Although the conclusion reached on the review of the judgment before us, is that it should be affirmed, we are unwilling to adopt the views of the Supreme Court relating to the legality of the admission of opinion evidence as to the age of the frequenters of the place, kept and maintained by the plaintiff in error, and as to the nature of the testimony required to establish the evil repute of the frequenters of the place, and thus of the place itself.

The indictment is in the common law form for keeping and maintaining a disorderly house. One of the elements of the unlawful conduct of the place charged in the indictment, is that the plaintiff in error habitually suffered and permitted intoxicating liquors to be sold to minors under the age of eighteen years, and suffered such minors to frequent and lounge in the room and place where intoxicating liquors were kept and sold. Under a statute of this state, the sale or gift of any intoxicating liquors to a minor under the age of

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eighteen years, by a person licensed to sell intoxicating liquors, his agents or servants, the act of suffering or permitting such minor to frequent or lounge in the room or place where such liquor is kept or sold, is a misdemeanor. The habitual violation of this statute would constitute the place where such unlawful acts occurred, under the decision of the courts of this state, a disorderly house. *State v. Williams*, 30 N. J. L. 102; *State v. Schlosser*, 85 Id. 165; affirmed in 86 Id. 374; *State v. Littman et al.*, 88 Id. 392.

Counsel for the state undertook to establish, in addition to other elements of disorder charged in the indictment, and which appear to have been supported by proof amply sufficient to sustain the conviction had in this case, that intoxicating liquors were habitually sold on premises to minors under the age of eighteen years, and that minors were allowed to frequent the place, &c., in violation of the statute above referred to. It was on this issue that the trial judge permitted witnesses to give opinion testimony as to the age of persons frequenting the place, such testimony being based solely upon their appearance.

We think this testimony was improperly received, but the judicial error committed in that regard cannot enure to the benefit of the plaintiff in error and work a reversal of the judgment under consideration, for the reasons to be presently stated.

The Supreme Court, in dealing with the question in hand, disposed of it by saying that to reject such evidence would, according to Professor Wigmore on Evidence, section 222, be pedantically over cautious. This view we deem unsound. The fallacy of it lies in failing to discriminate between age as a matter of fact and age as a matter of appearance. In the present case the statute and indictment deal with a question of fact wholly capable of proof in courts of justice by competent evidence. The fact of age is not within the category of things as to which the fact can be proved by opinion testimony.

In *Koccis v. State*, 56 N. J. L. 44, Mr. Justice Garrison points out with clearness the distinction which exists

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between "that class of cases in which a witness may state the inference drawn by him from facts within ordinary knowledge occurring in his presence," and the class of cases in which a witness "whose possession of special knowledge renders his opinion admissible upon a state of facts within his specialty, without regard to the manner in which the facts are established and without requiring that they should have come in whole or in part under the personal observation of the witness."

Referring to the former class of cases, Mr. Justice Garrison says: "Familiar instances in which testimony of this kind may be given are—whether two people were in love, whether a man was sick or dazed, or despondent or drunk; whether a dog was savage or a horse gentle, and, in general, any matter touching physical or mental manifestations or appearances as well as all questions of identity, resemblance, duration, distance, dimension, velocity, noises, smells and many other matters where an inference drawn by an observer is commonly recognized and received as an equivalent for the congeries of facts that produces it."

But, as to the age of a person, there is no congeries of facts—it is itself a fact entirely capable of direct proof if it be important to prove it.

Not only in the criminal law is age often the very essence of a misdemeanor, as here, but in civil cases succession and the right of property depend on it.

The character of proof required where age is the essence of a misdemeanor is illustrated by the following cases: In *Rex v. Wedge*, 5 C. & P. 297; 24 E. C. L. 329, the indictment charged the defendant with an attempt to abuse an infant under the age of ten years, on the 5th day of February, 1832, and the only testimony of the age of the child was given by the father, who stated that in February, 1822, he went from home a few days and that his wife had not been confined, and that on the 9th day of the same month he found that the child had been born, and he was told by his wife's mother that it had been born the day before; the grandmother was alive at the time of the trial, but the mother was dead. The court held that the evidence was not suffi-

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cient, for in a matter of such importance the best evidence ought to be adduced.

In *Regina v. Day*, 9 C. & P. 722; 38 E. C. L. R. 306, where the defendant was charged with a like offence, the mother was at home ill, and therefore could not attend the trial, and the girl's father testified that the child was not born in wedlock and that he could not precisely state the time of birth, as he was at that time at work at some distance from the place at which the mother was.

The prosecutrix, herself, testified that she was ten years old. Lord Coleridge held that the proof of the age was not sufficient.

In *Queen v. Hays*, 2 Cox C. C. 226, the child's mother testified that the child was born on the 7th day of February, 1837. The offence was committed on the 1st of February, 1847. The mother was the only witness who spoke to the age of the child. She stated that she never kept an account of the child's age, and that her knowledge of it was derived from hearing her husband speak of it, and from conversation with him and the child; and that it had been usual to keep the birthday of the child on the 7th of February. It being objected that more certain proof as to the age was requisite, Coltman, J., observed that the testimony in *Rex v. Wedge*, *supra*, was hearsay, but that this testimony went much further and must be submitted to the jury as some evidence, though open to observation as to the child's age. See, also, *Regina v. Nicholls*, 10 Cox C. C. 476, where the mother testified to the age of her child.

It is manifest that the theory on which the two last cases referred to were submitted to the jury, was that as the mother of each child was a competent witness to the fact of birth of her child, and as each had testified as to the date when that event happened, there was some evidence to go to the jury of the fact of age, the value of which was for the jury to determine in view of the uncertainty of the testimony on that point.

In *Rosc. Cr. Ev.* (8th ed.) *272, the author says: "In cases where the offence depends upon the age, this must be proved

in the usual way by the girl herself, or by a person who can speak to the date of birth. In *Reg. v. Robins*, 1 C. & K. 456; 47 E. C. L. 456, it was held that it was no defence that the prisoner did not know that the girl was under sixteen, or that from her appearance he might have thought that she was of greater age." In that case the father of the girl testified that she was between fifteen and sixteen years of age, and that she would not be sixteen until October, and that he was at home when she was born.

It is to be noted that the assertion by Roscoe that the age may be proved by the girl herself is not supported by the case cited.

In 1 *Encycl. Ev.* 735, the text reads: "But when the fact of age is not one of pedigree to be established for other purposes, hearsay evidence cannot be received in proof thereof." *People v. Sheppard*, 44 Hun 565; *Peterson v. State*, 83 Md. 194; 34 Atl. Rep. 834. The same rule of evidence is applied to civil cases where age is a fact to be proved.

It would not only be a serious but a destructive innovation in a sound and salutary rule of evidence, that the best evidence that the nature of the case is susceptible of must be produced, if, for instance, infants could claim succession to and rights of property upon proof that they had the appearance of having attained their majority, or persons who had attained their majority and had entered into contracts could avoid such contracts upon proof that they appeared to the witnesses to be under the age of twenty-one years.

It is a matter of common knowledge, derived from observation and experience, that there is nothing more uncertain and highly speculative than that of attempting to fix the age of a person by his or her appearance. Therefore, to permit a witness to give an opinion as to the age, where age is a fact to be proved, is to open the gate to the realm of indefinite guesswork, and thereby subvert a necessary and salutary rule of evidence that the existence of a fact must be proved by competent testimony and not by conjecture. It is not pretended by those who advocate the admission of such opinion testimony, that it tends to establish the precise age

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of the person, but that it does so approximately, at least to that degree as to satisfy all legal requirement.

But it must be borne in mind that, in the present case, the statute makes the sale of intoxicating liquors to a minor under the age of eighteen years, and not to one appearing to be under that age, a misdemeanor; hence the fact of age becomes vitally material. If the minor, to whom intoxicating liquor was sold, had attained the age of eighteen years, though he appeared to be but sixteen, there would be no violation of the statute. If the plaintiff in error had been indicted under the statute for selling intoxicating liquors to a minor under the age of eighteen years, he could not have successfully defended himself against the charge by proof that the minor appeared to him and other witnesses to be of the age of eighteen years.

While it may very well be that in some instances the application of the rule of evidence, under discussion, in its full severity, worked hardship by reason of inability to prove age as a fact, this reason can no longer obtain with full force, at least, in this state in view of the fact that the legislature in 1888 passed a supplement to the Evidence act which, in substance, provides that all transcripts of death, marriages and births made by any physician, &c., according to law, to any county board of health or local board of health of any municipality of this state certified to as directed by the act shall be received as legal evidence of the matters and facts therein stated. *Pamph L.* 1888, p. 182; 2 *Comp. Stat.*, p. 2229, §§ 28, 29; *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910.

Before proceeding to discuss the merits of the assignment of error relating to the refusal to strike out the incompetent testimony admitted it will be in order here to rectify an expression, in the opinion of the Supreme Court, on the nature of the testimony required to establish the evil repute of the frequenters of the place and that of the place itself.

The Supreme Court says: "That the principle upon which evidence of the conduct and conversation of frequenters of the place is permitted is that it tends to show the charac-

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ter of the people and hence of the place where they gather," &c., and *State v. Littman et al.*, 86 N. J. L. 453, 458, is cited in support of this proposition. In that case the Supreme Court said: "Whether the frequenters of the house were of evil name and fame and of dishonest conversation was a question of fact to be determined, not alone by their general reputation, but by their conduct and conversation."

On review of that case here, this court, in commenting upon this declaration in the Supreme Court's opinion, said: "We deem this to be an inaccurate statement of the legal rule so far as it applies to the matter of evil name or fame of those who were in the habit of frequenting defendant's house. By evil name and fame is meant reputation, and that cannot be proven by specific acts of misconduct." *State v. Littman et al.*, 88 N. J. L. 392.

We will now give our attention to a consideration of the propriety of the trial judge's refusal of the motion, made by counsel for plaintiff in error, to strike out the incompetent testimony relating to the age of the frequenters of the place.

From an examination of the record, it appears that the testimony as to the age of the frequenters of the place was not objected to by counsel for plaintiff in error at the time such testimony was offered and admitted. It also appears that on the cross-examination of Smith and Pirola, counsel for plaintiff in error asked these witnesses as to the age of the girls who frequented the place. When the state rested, counsel for plaintiff in error made a motion that all evidence concerning the age of the persons who were alleged to have frequented the place, except such evidence as was given concerning the age of two, whose specific ages were given, be stricken out, on the ground that such testimony given was not proof of age.

The motion to strike out was properly denied. Counsel will not be permitted to sit by in silence and let incompetent evidence be introduced, cross-examine on and experiment with it, and at the close of the state's case finding it to his disadvantage to have such testimony in the case, move that it

be stricken out. *State v. Hummer*, 81 N. J. L. 430; *State v. Kubaszewski*, 86 Id. 250.

Counsel for plaintiff in error further insist that the trial judge erred in submitting, in his charge to the jury, the opinion testimony, as to age, for the jury's consideration.

It appears from the record that the judge in his charge to the jury commented upon the opinion testimony as to age, and that counsel for plaintiff in error took a general exception to the charge and assigned error on that portion of it.

Upon examining the assignment of error we find that it includes within it two distinct propositions of law, one sound and the other unsound. The court, in substance, told the jury that they must determine whether or not sales had been made to minors and if that were so there must be proof of age. This was an accurate statement of law. And in this connection the court further stated to the jury that the age of such minors may be properly proven by opinion testimony. As age was the essence of the offence, this was an inaccurate statement of law.

But, because the assignment of error includes within it two distinct legal propositions, one sound and the other unsound, and as the case is before us on a strict bill of exceptions, the assignment is ineffectual and cannot be considered.

It is further urged that comment made by the trial judge on the nature of the testimony of the case was harmful to the plaintiff in error, thereby entitling him to a reversal of the judgment. The trial judge charged the jury that: "If the testimony of the case is true, there is no question but that one of the most detestable crimes has been committed in your city." This, from an examination of the testimony, does not appear to have been an improper comment to make. In view of the fact that the trial judge warned the jury not to permit the nature of the testimony to influence their consideration of the innocence or guilt of the plaintiff in error, if the comment was harmful standing by itself, it was rendered harmless by this warning.

The judgment will be affirmed.

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WHITE, J. (concurring). My vote for affirmance in this case is based upon the opinion of the Supreme Court therein (reported in 88 N. J. L. 392), which expresses my views, and not upon the opinion of this court now filed, from the deliverances of which regarding so-called "opinion" evidence as to age in this class of cases, I dissent.

I am unable to agree that a witness may properly be permitted to testify from observation that two people were "in love," or that a man was "sick," or "drunk," or "dazed," or "despondent," but when it comes to a question of apparent age, can only describe the details of appearance (in cases where birth witnesses or records cannot be found) and leave the jury to guess at the age from such description. In a case like the present I am wondering just how, in these modern days of short dressing, a witness would describe the details of appearance of the females who frequented this resort so that a jury could intelligently guess whether they were fourteen or forty years old, without saying "they appeared to be under eighteen years of age," or "about fourteen years old," or words of a similar import. I do not think this is "opinion" evidence.

It is said, however, that age is susceptible of accurate proof. In disorderly house cases there might be some practical truth in this assertion if children who frequent these houses took their parents' family Bibles with them, but this seems to be about the last thing they think of doing. Practically in ninety-nine cases out of every hundred of such frequenting it is not true that age is susceptible of accurate proof in these disorderly house cases, and I think the rule from which I dissent is not only unsound in principle, but vastly pernicious in practice.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

**GEORGE BINGHAM, PLAINTIFF-APPELLANT, v. HARWOOD
EDWARD ODEREY FISH, DEFENDANT-RESPONDENT.**

Argued July 5, 1916—Decided November 20, 1916.

In an action of deceit for the purchase of stock in a company, claimed to have been induced by false representations as to its value, it is not enough for the plaintiff to prove that the company, the stock of which he purchased, possessed assets, but the value of the assets must be shown, as an element from which the jury can estimate the damages. A nonsuit by the trial court, for the lack of such proof, is not error.

On appeal from the Supreme Court.

For the plaintiff-appellant, *M. Casewell Heine*.

For the defendant-respondent, *Coddling & Oliver*.

The opinion of the court was delivered by

BLACK, J. This was an action of deceit tried at the Union Circuit, resulting in a nonsuit. The ruling of the trial court is alleged as the sole error on this appeal. That ruling was based on the ground that there was no testimony in the case showing the value of the assets of the company, in which the appellant bought stock, viz., the value of the assets of the Gem Exploration Company of South Dakota. The trial court held that the value of the assets in the testimony is left in an absolutely uncertain state. There is no basis from which the jury could estimate the damages. The fact of assets and their character are shown, but no testimony is presented, showing the value of the assets. This is the second trial of the case. The first trial resulted in a nonsuit, which, on appeal to this court, was reversed. *Bingham v. Fish*, 86 N. J. L. 316.

The rule of law to be applied in this class of cases is elemental and firmly established, viz., the plaintiff in an action

of deceit must show that he has sustained the damages, which he alleges he suffered. *Lams v. Fish*, 86 N. J. L. 321; *Crater v. Binniger*, 33 Id. 513; *Smith v. Duffy*, 57 Id. 679; *Duffy v. McKenna*, 82 Id. 62; *Smith v. Bolles*, 132 U. S. 125.

A short statement of the important facts will illustrate the application of the principle of law which the trial court was called upon to apply at the trial. The suit was brought by the plaintiff-appellant against the defendant-respondent in an action of deceit, for fraudulently inducing the plaintiff to buy four thousand shares of stock in the Gem Dredging Company of South Dakota, for which he paid \$1,000. He was afterwards induced to change this stock for four thousand shares in the Gem Exploration Company of South Dakota, which he now holds. The Gem Dredging Company of South Dakota, the first company, acquired rights to diamond mining properties in Brazil, for which it paid large sums of money. This company had a large authorized capital stock, and for that reason was not registered in Brazil. Afterwards the Gem Exploration Company of New Jersey, with a small capital, was organized, to which company all the properties and assets of the Gem Dredging Company of South Dakota were conveyed. This company was registered in Brazil. Afterwards the Gem Exploration Company of South Dakota, with a large authorized capital stock, was formed, which new company acquired all the capital stock of the Gem Exploration Company of New Jersey. The stockholders of the acquired company, including the plaintiff-appellant, exchanged their holdings for stock in the Gem Exploration Company of South Dakota, so that the Gem Exploration Company of South Dakota now owns, through its stock ownership of the Gem Exploration Company of New Jersey, all the properties and assets acquired during these various transactions. The testimony at the close of the appellant's case showed that the company was possessed of diamond mining rights in the bed and shores of the Jequitinhonha river and the Cathe Mirim river, what are called the Cubas, Ronco and Santos properties, a contract right, in what is designated in the record as the Raiz property, also various

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options to purchase other diamond properties, in the State of Minas Geraes, known as Perpetua, and other properties, some machinery, buildings, tools, &c., at the place of operation, but nowhere in the record can we discover testimony from which the value of these properties can be determined. Hence, it is impossible to say what value, if any, the shares of stock may have.

The argument of the appellant, to use the words of his brief, is, at least, this, showing (the assets) by the plaintiff was sufficient to create an inference, which the defendant-respondent should have been called upon to rebut, from his greater and more accurate sources of information, and, consequently, the granting of the motion to nonsuit was error, citing *McMillan v. Dallas*, 88 N. J. L. 690.

We think the case, however, is controlled by the case in this court of *Lams v. Fish*, *supra*, which holds that where the action is predicated on the purchase of stock in a company, claimed to have been induced by fraudulent representations as to its value, there must be proof that the stock was in fact worth less than the plaintiff paid for it.

The ruling of the trial court granting the motion to nonsuit was not error. The judgment is therefore affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, JJ. 12.

For reversal—None.

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Cetola v. Lehigh Valley R. R. Co.

NICOLA CETOLA, PLAINTIFF-APPELLANT, v. LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT-RESPONDENT.

Submitted July 10, 1916—Decided November 20, 1916.

An employe assumes the risk of such dangers attending the prosecution of his work as he knows, or could discover by the exercise of ordinary care for his personal safety, and for hurt happening to him from those dangers, the employer is not responsible. Distinction between contributory negligence and assumption of risk pointed out.

On appeal from the Supreme Court.

For the plaintiff-appellant, *Charles M. Egan*.

For the defendant-respondent, *Collins & Corbin*.

The opinion of the court was delivered by

BLACK, J. This is an appeal from a judgment of nonsuit, granted by Judge Speer, in the Hudson Circuit Court.

The action was brought under the Federal Employers' Liability act. On January 17th, 1916, the plaintiff-appellant was in the employ of the defendant-respondent, cutting steel rails and repairing its tracks, at Johnson avenue, Jersey City.

While the appellant was at work he was called by the foreman to come where the other men were working "to drop a rail down and cut it." Four men were handling this rail at that time when the plaintiff came to where these four men were. Before he had an opportunity to touch the rail, or had anything to do with it, the men dropped the rail and broke it, where they had first cut it with a chisel. The purpose of dropping it was to break it where it had been cut. The rail weighed six hundred and forty-eight pounds, twenty-four pounds to the foot, twenty-seven feet long. The plaintiff did not reach there in time to assist the men in handling the rail.

The appellant testified that he had seen men handle the same kind of rails—the same number of men handle them

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that day—before he was injured. They handled them all right with the same number of men. He also testified that he had seen no less than seven men handle the rail of the size which fell on his foot and injured him—that it needed seven men. He also testified that he thought it was dangerous. There being no disputed questions of fact in the case, the test is, whether from the plaintiff's evidence, viewed in its most favorable aspect, negligence of the defendant may be reasonably inferred. *Metropolitan Railway Co. v. Jackson*, L. R., 3 App. Cas. 193; *Newark Passenger Railway Co. v. Block*, 55 N. J. L. 605.

The ruling of the trial judge rested on the ground that the plaintiff assumed the risk, the presence of which he realized at the time, and acknowledged in his testimony at the trial. We think this ruling of the trial judge was not error.

The principle applied by the trial judge in this case is one of the fundamental principles in the law of negligence, applied and illustrated in many reported cases. It was recognized and applied by the United States Supreme Court, in the case of *Seaboard Air Line Railway Co. v. Horton*, 233 U. S. 492, 504, where the distinction between contributory negligence and assumption of risk is pointed out. Contributory negligence involves the notion of some fault or breach of duty on the part of the employe. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employe. The risk may be present, notwithstanding the exercise of all reasonable care on his part. See, also, *Toledo, &c., Railroad Co. v. Slavin*, 236 U. S. 454.

In our courts Mr. Justice Dixon states the rule with clearness thus: An employe assumes the risk of such dangers attending the prosecution of his work, as he would discover by the exercise of ordinary care for his personal safety, and that, for hurt happening to him from those dangers, the employer is not responsible. *Atha, &c., Co. v. Costello*, 63 N. J. L. 27. To the same effect, in this court, are the cases of *Dillenberger v. Weingartner*, 64 Id. 292; *Christensen v. Lambert*, 67 Id. 341. In those cases, the dangers were known to the employe,

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or he had become acquainted with them during the employment. 4 *Thomp. Neg.* (2d ed.), § 4608 *et seq.*

Finding no error in the record, the judgment of nonsuit is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 13.

For reversal—PARKER, J. 1.

JOHN SOMMER FAUCET COMPANY, PLAINTIFF-RESPONDENT, v. COMMERCIAL CASUALTY INSURANCE COMPANY, DEFENDANT-APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

1. The construction and effect of a written instrument is a matter of law, to be determined by the court and not by the jury. But when the construction of a written instrument depends upon extrinsic facts, as to which there is a dispute, its construction is a mixed question of law and fact, and presents a jury question under proper instructions from the court.
2. What are "repairs usual and necessary to the care and maintenance of the premises," "all usual or special operations incident thereto," or "unusual alteration or repair of premises" in a manufacturers' public liability policy of insurance, as applied to the repair of a platform on the premises, presents a jury question. The refusal to nonsuit or direct a verdict by the trial court was not error.

On appeal from the Supreme Court.

For the defendant-appellant, *McCarter & English*.

For the plaintiff-responder, *Lum, Tamblyn & Colyer*.

The opinion of the court was delivered by

BLACK, J. This suit was instituted on a manufacturers' public liability policy of insurance, issued by the defendant company, dated June 25th, 1912. The policy covered the period from August 2d, 1912, to August 2d, 1913, whereby it agreed to indemnify the plaintiff company against loss resulting from claims, against the assured for damages, on account of bodily injuries, including death, accidentally suffered by any person or persons *not employed* by the assured, by reason of the business described and conducted at the location named in the warranties therein stated. The respondent company manufactured piano backs, piano cases and wooden faucets, at No. 355 Central avenue, Newark, New Jersey, being the location named in the policy.

The case was tried at the Essex Circuit Court, resulting in a verdict for the respondent, upon which judgment was entered. The appeal is from that judgment. The alleged errors are trial errors, discussed under three points in the appellant's brief—*first*, the questions involved presented matters of law, upon which the trial judge should have controlled the jury, by granting the defendant's motions for a nonsuit and direction of a verdict; *second*, error in the charge of the trial judge in refusing to charge as requested; *third*, error in permitting the respondent's witness, Charles A. Winston, to answer certain questions propounded to him as an expert witness, and refusing to allow the appellant's witness, J. Horace Shale, to answer certain questions propounded to him as an expert witness.

The controversy arose over the meaning, construction and application of certain warranties in the policy of insurance, which are as follows: "4. Classified description of the business: All operations incidental to the following business, including repairs and alterations usual and necessary to the care and maintenance of the premises or plant? Manufacturers of piano backs and piano cases and wooden faucets."

"Erection, construction, demolition or unusual alteration or repair of premises or plant.—None."

"5. The foregoing statement correctly describes the business to be insured, including all usual or special operations

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incident thereto, and the location at which said business is conducted. None of the special operations described will be covered unless," &c.

On December 21st, 1912, one Nicola De Vincenzo, who was not employed by the respondent, suffered bodily injuries, while upon the premises, by reason of a shed or open wooden structure located upon the respondent's premises, collapsing and falling while the earth beneath the shed was being excavated. The shed covered a platform. The platform had become in a ruinous and decayed condition and was badly in need of repair. In order to make proper repairs, it was necessary to excavate the loose, drifting soil which had been washed down under the platform, so as to get a proper footing for the uprights to support the platform.

De Vincenzo was employed by the contractor doing the excavation. He recovered a judgment against the respondent, which was affirmed by this court and which has been paid, hence this suit. It is admitted by the appellant, on the motion to nonsuit, simply making the platform safe, would have been a repair or alteration, usual and necessary, within the terms of the policy, to the maintenance of the plant. They did not do that, is the insistence, but did something more. Now under the evidence, whether they did or not, depended upon extrinsic facts, as to which there is a dispute, hence the jury, and not the court, must determine the point. The construction and effect of a written instrument is a matter of law to be determined by the court and not by the jury. This rule of law is firmly settled in this court by a long line of cases. *Grueber Engineering Co. v. Waldron*, 71 N. J. L. 597. But when the construction of a written instrument depends upon extrinsic facts, as to which there is a dispute, its construction is a mixed question of law and fact and presents a jury question, under proper instructions from the court. 9 Cyc. 592; *Kinston Cotton Mills v. Liability Ass. Corp.*, 161 N. C. 562. That was the precise situation presented to the trial court, on the motion to nonsuit and to direct a verdict for the defendant. Hence, there is no error in the trial court's refusal of these motions.

Second, the appellant submitted thirteen requests in writing to the trial judge, on which exceptions are based, in so far as they were not charged. There was no error committed by the trial judge in this respect. For the most part, these requests involve the same questions presented to the court on the motions to nonsuit and direct a verdict. It would subserve no useful purpose to review them in detail. For illustrative cases, somewhat in point to the case under discussion, see *Charles Wolff Packing Co. v. Travelers Insurance Co.*, 94 Kan. 630; *Kinston Cotton Mills v. Liability Ass. Corp.*, *supra*. The cases, cited by counsel for the appellant as authorities, stand upon the particular facts of each case there decided.

Third, a witness, Charles A. Winston, for the respondent, was permitted to state that certain work described in the questions propounded was repairs and alterations necessary to the care and maintenance of the premises and plant; that the method adopted for repairing the platform was one of the ordinary methods of repairing it.

This was held proper in the case of *Kinston Cotton Mills v. Liability Ass. Corp.*, *supra*, a case in point to the one now under discussion, and we concur in that view. The question propounded to Mr. Shale, the treasurer of the appellant company, overruled by the trial court and therefore complained of, viz., "If special operations had been specified in this policy under the heading, what effect, if any, would that have had upon the rate of insurance?" was clearly immaterial and the exclusion of this question by the trial court was not error.

There being no error in the record, the judgment is therefore affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWATZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 14.

For reversal—None.

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Willever v. D., L. & W. R. R. Co.

LILLIAN WILLEVER, PLAINTIFF-APPELLANT, v. THE DEL-AWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, DEFENDANT-APPELLEE.

Submitted July 10, 1916—Decided November 20, 1916.

1. Where, as a part of its operating system, a common carrier by railroad in interstate commerce has provided, and notified its employes of, a rule that in the "movement of trains" when "cars are pushed by an engine," a man shall take "a conspicuous position on the front end of the leading car to signal the engineman in case of need," and an employe, so notified of the rule, who, in the performance of his duties, has, in reliance upon the rule, placed himself two hundred feet in front of a long train of empty freight cars not being "drilled" and standing on a track not used for "drilling" purposes, without engine or crew, is run down because a train crew attached an engine to the far end of the train and without warning pushed it over him, without a man being placed on the front end of the leading car in accordance with the rule, the question of the negligence of the train crew, the common carrier's employes, was properly left to the jury. Citing *D'Agostino v. Pennsylvania Railroad Co.*, 72 N. J. L. 358, and *Germanus v. Lehigh Valley Railroad Co.*, 74 *Id.* 662.
2. The "assumption of risk" of a section-gang foreman engaged in interstate commerce in the employ of a common carrier by railroad, whose duty it is to look out for the safety of himself as well as of the men under him, does not include the negligence of his fellow-employes under the Federal Employers' Liability act in failing to take a precaution or give a warning provided with his knowledge, to secure his safety by the system adopted by his employer for the operation of the railroad upon which he worked. Distinguishing *Precodnick v. Lehigh Valley Railroad Co.*, 74 N. J. L. 566.

On appeal from the Supreme Court, whose opinion is reported in 87 N. J. L. 348.

For the appellant, *Herbert C. Gilson* (*William C. Gebhardt* on the brief).

For the appellee, *Frederic B. Scott*.

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The opinion of the court was delivered by

WHITE, J. This is an appeal from a decision of the Supreme Court reversing a judgment of the Hunterdon County Common Pleas entered upon a verdict of a jury in favor of the plaintiff, the widow and administratrix of one William Willever, who was run over and killed by a train of empty freight cars of the defendant railroad company while he was working in the employ of that company as foreman of a section gang in its "yard," at Port Morris, in Morris county.

The action is based upon the Federal Employers' Liability act, and its amendments, making common carriers by railroad while engaged in interstate commerce liable for injury to, or death of, their employees, resulting in whole or in part from the negligence of the officers, agents or employees of such carriers.

The Supreme Court decided that there was no error in the action of the learned trial judge regarding the question of the accident having occurred while the deceased was employed in interstate commerce, and the correctness of this decision is conceded by the appellee, the defendant company.

Upon the other question involved, namely, was there evidence to support a finding of negligence on the part of the employes of the defendant company, we find ourselves unable to agree with the conclusion reached by the Supreme Court. That conclusion is expressly predicated upon an understanding of the facts as set forth in the opinion in the following language: "The decedent was a section foreman of the defendant company, and he, and the men under him, were required to keep in order the tracks and switches in the Port Morris yard. This yard was used for the breaking up, temporary storage and making up of trains which were devoted to interstate, as well as intrastate, commerce. Decedent had held the position of foreman for five years preceding the date of his death. Shortly before the accident occurred he was at work with his gang repairing certain switches in the yard. He left these switches to go to some other point in the yard—where, or for what purpose, the evidence does not show. As he was crossing track No. 5 he was run down at the switch

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connecting that track with another by a freight train which was being backed down the yard by a yard engine, and which was moving about as fast as a man walks. The testimony showed that no warning was given to the deceased by those in charge of the movement of this train, or by any other employe of the company of its approach. * * * A rule of the company which was put in evidence reads as follows: 'When cars are pushed by an engine a man must take a conspicuous position on the front end of the leading car and signal the engineman in case of need,' but there is nothing in the wording of this rule to suggest that it was promulgated for the protection of employes engaged at work in the defendant company's yards, and proof is uncontradicted that it has no application to the movement of engine and cars therein, but only for the guidance of employes upon trains moving upon the road itself."

We think the Supreme Court overlooked evidence from which the jury were justified in drawing a picture materially different from that presented by the above-quoted language, and, of course, the case being before that court upon appeal, and not on a rule to show cause, it is the existence and not the preponderance of justifying evidence that is controlling.

We think there was evidence from which the jury were justified in finding—(a) that Willever, when run over, was not crossing the track, but was at work in pursuance of the duties of his employment in cleaning snow and ice from the switch where he was killed; (b) that when he placed himself in the position, at work at that switch, which he occupied when he was run over, a train of empty freight cars nearly a quarter of a mile long was on the same track only about two hundred feet away, standing "dead"—that is, without engine attached or crew in charge, on a track and in a portion of the yard not used for "drilling" purposes, but only used to run trains in on in taking them to the portion of the yard about half a mile away, which was used for "drilling" purposes; (c) that he saw that this train of empties was not being "drilled," and that no yard engine or locomotive was near them when he started to work at the switch; (d) that after

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he had placed himself in this position, probably facing away from the train in order to watch out for danger from the other direction, relying on the observance of the rule above quoted to protect him against the movement in his direction of the train of empties, a yard engine with its crew went out from the "drilling" portion of the yard about half a mile away, and attached to the other end of this train of empties, and, without warning of any kind, commenced to push them silently toward Willever, without his knowing it and without reasonable care being first taken to ascertain that the track was clear where Willever was at work, and without a man taking "a conspicuous position on the front of the leading car to signal the engineman in case of need," as required by the rule (No. 102) above referred to; (e) that instead of the evidence being uncontradicted as to this rule not being for the protection of employes in defendant's yards, and having no application to the movement of engines and cars therein, and being only for the guidance of employes upon trains moving upon the road itself (as understood to be the case by the Supreme Court), there was evidence indicating that the rule did apply to the "movement of trains" within as well as without the company's yards where such movement fell within the language of the rule and the heading or subdivision under which it occurred in the book of rules, as distinguished from the process of "drilling" in the yards, and that such rule constituted a part of the system established by the defendant company for the movement of the trains to which it applied, in order, *inter alia*, to secure the safety of its employes, and (f) that what was done to this string of empty freight cars on the morning in question fell within the application of this rule, and that Willever, who had been furnished by the company with a copy of the book of rules containing it, relied for his safety upon the observance of its provisions, and that his death resulted from the neglect of the employes of the defendant company to carry out those provisions.

The evidence which, taken in connection with the other evidence in the case, we think formed a proper basis for such findings may be summarized briefly as follows: The "yard"

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mentioned was about two and one-quarter miles long and had in its widest part about forty tracks in all. There were six principal or main tracks upon which the trains were brought into the yard. The track upon which the accident occurred, "No. 5," or the "mud-track," was one of those six. O'Neill, a switchman in the employ of defendant company, testified regarding this track: "It isn't used for drilling; it's used for pulling trains in to be drilled." Upon this track a train of empty freight cars without any locomotive attached had been left standing, apparently over night, after having been brought in late the afternoon or night before from Maybrook, in the State of New York. The train comprised twenty-seven empty freight cars and was nearly a quarter of a mile long. Its nearest end was about half a mile short of, or away from, the "drilling" portion of the yard. Willever (the deceased), a section foreman, one of whose duties was to look out for the safety of himself and of the men under him while at work, was with his gang of two men at work cleaning the ice and snow from the switches in the yard and along these tracks on the morning in question. He put one of his men to work on one switch, and the other to work on another switch, both on an adjoining track, and then, telling them to watch out for trains, took a hammer in his hand and, about twenty minutes before the accident, left them and went around the end of some intervening cars or cabooses out of sight towards the switch where he was killed, on track No. 5, which switch was about three hundred feet from where he left his men. He was run over at this switch and the hammer was found at the switch. No one saw him after he left his men until just after he was run over. The switch in question was six car lengths (about two hundred feet) from the east end of the train of twenty-seven empty freight cars. Within a few minutes after Willever went to the switch two hundred feet in front of the eastwardly end of this string of empty freight cars, a switch engine with its crew, in pursuance of orders given about nineteen A. M. by the general yardmaster to get this string of empties and bring them to the "drilling" yard, went out to the "west tower" and backed up to the westerly end of the

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string, and, without warning of any kind, started to push them eastwardly toward the switch where Willever was working. The testimony was that Willever left his men about twenty minutes before the accident occurred, that the yardmaster gave the order to go after this string of empties about nine-ten, and that the accident occurred about nine-twenty-five. The switching crew consisted of the engineer in the engine, the conductor, who was on top of the *west* end of the front or eastwardly car of the string, a brakeman, who released the brakes and who was on top of the fifth car from the engine, and a switchman, who was in the "drilling" yard half a mile away seeing that the switches in that yard were properly set and the track there kept clear for this incoming train. The conductor, from his position on the *rear end* of the front car, gave the signal to start back and it was relayed by the brakeman to the engineer, who obeyed it. When the end or eastwardly car had gone six car lengths (about two hundred feet) at a speed "about as fast as you could walk," the conductor heard a man "holler," and, at the same moment, felt a bump and the wheels of the front truck became derailed, and looking down he saw Willever lying by the track with his legs run over, as a result of which he died in a little while. The conductor, who had not seen Willever before this, at once gave the stop signal, which was relayed by the brakeman to the engineer, who brought the train to a stop with the eastern end about twenty or twenty-five feet beyond the switch and the place where Willever lay. The rule No. 102, above quoted, was contained in a book of rules under the sub-heading "Movement of Trains." Some witnesses testified that this book of rules was for the operation of trains out on the main line only and was not intended to apply to yard work, but one of these witnesses testified, under cross-examination, that there were certain things in the book of rules which did apply to yard work. The evidence also showed that the book of rules was given to employes whose duties were exclusively within the yards as well as to employes who worked or ran trains on the main lines. Willever was furnished by the company with a copy of this book of rules. There was nothing in the book of

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rules to indicate that rule No. 102 had no application to "movement of trains" within yard limits, nor was there any evidence that Willever had ever been told that it did not so apply within those limits. The language of the rule itself is: "When cars are pushed by an engine," and the subdivision under which it occurs is headed, "Movement of Trains."

Assuming, therefore, that the verdict of the jury in favor of the plaintiff was a finding of the above facts, and that there was evidence to justify such finding, the question before us is, can the plaintiff recover? The Supreme Court, under the facts as it understood them, thought not, for two reasons, namely—*first*, because it thought there was no duty to give warning in the yards, and *second*, because it was Willever's duty as a section foreman (as the evidence shows he had been instructed and knew) to look out for his own safety as well as for the safety of the men under him. *Aerkfetz v. Humphreys*, 145 U. S. 418, is cited as authority for the first reason, and *Precodnick v. Lehigh Valley Railroad Co.*, 74 N. J. L. 566, for the second.

In the *Aerkfetz v. Humphreys* case the court said, in speaking of a track repairer who was run over in a "drilling" yard: "The plaintiff was an employe, therefore the measure of duty to him was not such as to a passenger or a stranger. As an employe of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at a slow rate of speed. * * * He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. * * * There could have been no thought or expectation on the part of the engineer, or of any other employe, that he would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train, or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose pres-

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ence was to be guarded against. The ringing of bells and the sounding of whistles of trains going and coming, a switch engine moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continually recurring movement of the cars, would take reasonable precaution against their approach. The engine was moving slowly; so slowly that any ordinary attention on the part of the plaintiff, to that which he knew was a part of the constant business of the yard, would have made him aware of the approach of the cars and enabled him to step one side as they moved along the track. It cannot be that under these circumstances the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employes who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendant."

This language, it seems to us, clearly indicates a material difference between the case *sub judice* and the class of "drilling" yard work cases to which it applies. In the Aerkfetz case the deceased "knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track where he was working." He knew that he was in a place where they were "drilling" cars in making up new trains, and that in that operation (under the system established for that purpose) cars were shunted back and forth, individually, and in groups without warning, and without lookouts being posted to see that employes were not in the way. In the present case, on the contrary, the deceased knew that he was in a place where "drilling" was not carried on, where cars were not being shunted about in making up trains, and as to the quarter-of-a-mile-long train of empty freight cars standing on an incoming track, with no engine attached nor crew in charge, that he was protected by one of the rules forming a part of the system established by the defendant company for the "movement of trains" which required that if that train were moved in his direction by being pushed from the other end, a man was

required to first take "a conspicuous position on the front end of the car" nearest him "to signal the engineman in case of need," and that a man so placed would of course see him at his work on the track only two hundred feet in front and not give the signal to start backing without warning to him to get out of the way. *Albanese v. Central Railroad Co.*, 70 N. J. L. 241.

We think the essential difference between the two cases consists in the fact that here the cars, before the engine and crew came after them, were in a place and in a condition which indicated that they were not being "drilled," nor subject to being "drilled," but that, on the contrary, they, when moved, would only be moved as a "train" from that place to some other place, and, therefore, in accordance with the rules of the system applicable to the "movement of trains" provided for the safety of the employes whose duties took them on the track in front. We think the present case falls rather within that line of cases illustrated by *D'Agnostino v. Pennsylvania Railroad Co.*, 72 N. J. L. 358, in the Supreme Court, and *Germanus v. Lehigh Valley Railroad Co.*, 74 *Id.* 662, in this court, both of which hold that where a system or custom of warnings under certain circumstances is established, the employes involved had the right to rely upon such warning being given, and that failure to give them, resulting in injury, constitutes a cause of action.

Turning now to the second point relied upon by the Supreme Court, it is said that Willever, having received instruction and knowledge, as section foreman for five years, that he must look out for his own safety, the defendant company, under the doctrine of assumption of risk, as applied in the case of *Precodnick v. Lehigh Valley Railroad Co.*, *supra*, was, as to him, under no duty to give warning. We do not think the negligence of defendant's employes in failing to comply with a rule established for Willever's safety, was one of the dangers he undertook to look out for, and, therefore, one of the risks he assumed. Obviously, Willever's undertaking to look out for his own safety is, to a certain extent, a relative assumption, and, therefore, prescribed by the limit of dangers

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incident to his employment under the system established for the operation of the business. This is necessarily so. Suppose, for instance, it had been Willever's duty to go under the standing freight cars in question and to do his work there in a position where he could not possibly see the new danger and escape in time when the engine backed up to and started to push the train without warning to him, and that under a system provided by the employer with his knowledge a man was stationed alongside to watch and warn, and that the man so on watch had negligently failed to see and warn, and Willever had been run over in consequence, no one would contend that under the Federal Employers' Liability act, making the employer liable for the negligence of fellow-employees, Willever's assumption of risk had included this act of negligence. And so, in the case here presented, feeling, as we do, that the jury were justified by the evidence in finding a condition or state of facts which made rule No. 102 applicable, we think Willever had the right, under the system of which that rule formed a part, to rely upon the care prescribed by that rule being taken by his fellow-employees for his protection, and that he, consequently, did not assume the risk of its negligent omission.

For the reasons herein expressed, the judgment of the Supreme Court is reversed and the judgment of the Court of Common Pleas of Hunterdon county is affirmed, with costs.

For affirmance—SWAYZE, TRENCHARD, PARKER, BERGEN, WILLIAMS, JJ. 5.

For reversal—THE CHANCELLOR, KALISCH, BLACK, WHITE, HEPPENHEIMER, TAYLOR, GARDNER, JJ. 7.

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Bodell v. Real Securities Inv. Co.

JOSEPH J. BODELL, PLAINTIFF-RESPONDENT, v. REAL
SECURITIES INVESTMENT COMPANY, DEFENDANT-
APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

On appeal from the Supreme Court.

For the plaintiff-respondent, *Borden D. Whiting*.

For the defendant-appellant, *Howe & Davis*.

PER CURIAM.

This suit was one to recover damages for the conversion of goods by a landlord in derogation of the rights of a chattel mortgagee. In June, 1914, the tenant, Lambrose, executed a chattel mortgage to the plaintiff, Joseph J. Bodell, for \$350, covering goods and chattels on the demised premises. Prior to that time several months' rent became due. In October, 1914, the landlord issued a distress warrant, and, under it, a constable sold all the right and interest of the tenant in and to the mortgaged chattels. The chattel mortgagee contended that the sale was made subject to his mortgage, and demand having been made on the defendant, the landlord, for possession of the goods, who refused to deliver them, the chattel mortgagee brought suit in the District Court of East Orange to recover damages for their conversion. There were no disputed facts. At the conclusion of the plaintiff's case the defendant moved for nonsuit, which was denied, and the court subsequently entered judgment in favor of the plaintiff and against the defendant for \$350 damages, and costs. An appeal was taken to the Supreme Court which affirmed the judgment of the District Court for the reasons stated by the judge of that court in rendering his decision. The judgment of the Supreme Court has been appealed to this court.

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In *Woodside v. Adams*, 40 N. J. L. 417, it was held by this court that the lien under a distress warrant relates to the time of actual seizure under the distress, and that the chattel mortgage there in question having been made and delivered before the distress warrant was executed, the right of the mortgagee was superior to that of the landlord. In this case some rent had accrued before the chattel mortgage was placed on record, but the distress warrant was not issued, and, consequently, was not executed until afterward.

The doctrine of *Woodside v. Adams* is dispositive of the question *sub judice*. As the chattel mortgage was executed and recorded prior to the issuance of, and levy under, the warrant of distress for rent, the chattel mortgagee is entitled to prevail, and the judgment must be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

GEORGE CLARK, PLAINTIFF-APPELLANT, v. HUDSON AND
MANHATTAN RAILROAD COMPANY ET AL., DEFEND-
ANTS-RESPONDENTS.

Argued June 21, 1916—Decided November 20, 1916.

On appeal from the Supreme Court.

For the appellant, *Alexander Simpson*.

For the respondent Hudson and Manhattan Railroad Company, *Collins & Corbin*.

For the respondent Pennsylvania Railroad Company, *Vredenburg, Wall & Carey*.

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PER CURIAM.

The trial court on a second trial directed a verdict for defendants.

The only ground of appeal assigned is that the court directed a judgment of nonsuit. But the printed book before us shows that the court refused to nonsuit.

The argument of appellant is that the court erred in directing a verdict for defendants. But if this were properly before us as a ground of appeal, the answer is, that there was no exception taken to this action of the trial court; and without such exception, its ruling is not subject to review. *Kargman v. Carlo*, 85 N. J. L. 632.

The judgment is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

CLOSTER DAIRY FARMS, RESPONDENT, v. NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
APPELLANT.

Argued July 5, 1916—Decided November 20, 1916.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 557.

For the plaintiff-respondent, *Mark Townsend, Jr.*

For the defendant-appellant, *John A. Hartpence.*

PER CURIAM.

The judgment is affirmed, with costs, for the reasons stated in the opinion of Mr. Justice Minturn. The remark in the

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opinion, to the effect that the defendant's contentions required the court to "review the findings of fact" was, obviously, a mere slip, by which the somewhat technical word "review" was substituted for "examine," as appears from the words immediately succeeding.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 10.

For reversal—None.

GEORGE W. CRANE, RESPONDENT, v. DANIEL REUTSCHLER, APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 560.

For the respondent, *Abraham Levitan*.

For the appellant, *Harry T. Davimos*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Minturn in the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

89 N. J. L. Croasdale v. Quarter Sessions of Atlantic.

**FRANCIS E. CROASDALE, APPELLANT, v. THE COURT OF
QUARTER SESSIONS OF THE COUNTY OF ATLANTIC,
RESPONDENT.**

Argued July 6, 1916—Decided November 20, 1916.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 506.

For the appellant, *Washington & Smith*.

For the respondent, *Clarence L. Cole* and *G. Arthur Bolte*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Parker in the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 10.

For reversal—None.

**J. VICTOR D'ALIOIA, APPELLANT, v. CITY OF SUMMIT,
RESPONDENT.**

Argued June 30, 1916—Decided November 20, 1916.

On appeal from the Supreme Court, whose opinion is reported *ante* p. 154.

For the plaintiff-appellant, *Anthony R. Finelli*.

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For the defendant-respondent, *Corra N. Williams*.

PER CURIAM.

We think the payment was voluntary. The present plaintiff had the option to pay or appeal. He chose to pay. He cannot recover back the money. The judgment is affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, JJ. 10.

For reversal—None.

BENJAMIN L. HARRISON, APPELLANT, v. ALBERT DICKERSON, RESPONDENT.

Submitted July 10, 1916—Decided November 20, 1916.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

“The Common Pleas nonsuited the plaintiff in an action brought in that court and *ad damnum* \$500. The ground of the nonsuit was that the plaintiff, when sued in a justice’s court upon a cause of action that arose out of the same transaction, did not file any set-off or recoupment based upon the claim for which the action in the Pleas was brought. The judgment of nonsuit was erroneous under the cases of *Sipley v. Wass*, 47 N. J. L. 187, and *Clancy v. Neumayer*, 51 *Id.* 299. It is argued that these decisions are inapplicable because of section 25 of the Small Cause act of 1903 (Revision), which was enacted after the decisions in question had

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been made. We do not think that section 25 has this effect; it provides what shall happen if a set-off is filed but does not abrogate the previous decisions as to the compulsion to file it.

"The judgment of the Pleas is reversed and a *venire de novo* awarded."

For the appellant, *Elmer W. Romine*.

For the respondent, *James H. Bolitho*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, SWAYZE, TRENCHARD, PARKER, BERGEN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

ELIZABETH L. HOWELL, EXECUTRIX OF SIDNEY K. LAN-
INGER, DECEASED, APPELLANT, v. EDWARD I. ED-
WARDS, COMPTROLLER, ET AL., RESPONDENTS.

Submitted July 10, 1916—Decided November 20, 1916.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 134.

For the appellant, *Henry C. Hunt*.

For the respondents, *John W. Wescott*, attorney-general.

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PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Kalisch in the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

METROPOLITAN LUMBER COMPANY, A CORPORATION,
PLAINTIFF-RESPONDENT, v. JOHN H. DUNN & SONS,
A CORPORATION, DEFENDANT-APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

"The plaintiff sued to recover the price of lumber sold to the defendant September 9th, 1914, and delivered November 7th, 1914.

"The delivery and non-payment was admitted.

"It appeared that on September 16th, 1914, the plaintiff sold the defendant other lumber which was delivered with the first lot.

"The first lot was sold on thirty days' credit and a promissory note was to have been given therefor, but was not given. The second lot was sold 'for cash.'

"The second lot not being paid for a judgment was obtained for the price thereof.

"In the present suit, which was for the first lot, the defendant moved for judgment in its favor 'on the ground that

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the whole debt for the purchase price of the goods sold constituted an entire and inseparable demand and that judgment having been entered in the first suit for a part of the demand, the matter was *res adjudicata*.'

"This motion was denied, and the trial judge, sitting without a jury, found for the plaintiff.

"We think this was proper.

"It is clear that each sale constituted a separate cause for action.

"It is true that on November 27th, 1914, a promissory note was given by defendant to the plaintiff covering the entire indebtedness, but that note fell due and was dishonored before either suit was brought. Its only effect, of course, was to postpone the time of payment until the maturity of the note. When at maturity, it was unpaid, the plaintiff's right of action was the same as before it was given.

"The judgment below will be affirmed, with costs."

For the defendant-appellant, *Joseph E. Conlon*.

For the plaintiff-respondent, *Nathan H. Berger*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance — THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 11.

For reversal—None.

Napoleon v. McCullough.89 N. J. L.

**WILHELMINA NAPOLEON, RESPONDENT, v. WILLIAM
McCULLOUGH, APPELLANT.****Argued June 29, 1916—Decided November 20, 1916.**

On appeal from the Supreme Court, in which the following *per curiam* was filed:

"This is a case under the Workmen's Compensation act. The prosecutor seeks to reverse the judgment because the trial judge failed to make a finding that the death of the petitioner's decedent was the result of injuries received by him while in a state of intoxication, and that such intoxication was the natural and proximate cause of such injuries. Whether or not that was so, presented a question of fact for the court to determine.

"There was testimony of witnesses to the effect that they saw the petitioner's decedent shortly before the occurrence of the accident in an intoxicated condition sitting on the seat of the wagon driving the horses.

"There was also testimony to the effect that the deceased, just before the accident happened, appeared to be all right.

"The only eye witness to the happening of the accident testified that the deceased appeared to him to be all right and that a jounce of the wagon threw the deceased to the street.

"This being the state of the evidence, the trial judge was warranted in making the finding that he did. He was under no legal duty to make an express finding negating the assertion of the prosecutor that the deceased was intoxicated at the time he received his injuries, and that such intoxication proximately caused his injuries and death. Such a negative finding was necessarily included in, and will be presumed from, the finding of the trial judge that the accident arose out of and in the course of the employment of the deceased.

"Judgment will be affirmed, with costs."

For the respondent, *Brogan & Sullivan*.

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For the appellant, *James A. Sullivan*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEP-
PENHEIMER, WILLIAMS, JJ. 10.

For reversal—None.

EDMOND PARKER, RESPONDENT, v. WILLIAM T. HICKSON,
APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 443.

For the respondent, *Edwin C. Caffrey*.

For the appellant, *Howe & Davis*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

For affirmance — THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEP-
PENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

MARTIN RUANE, ADMINISTRATOR OF PATRICK RUANE,
DECEASED, RESPONDENT, v. ERIE RAILROAD COM-
PANY, APPELLANT.

Argued March 13, 1916—Decided March 14, 1916.

On appeal from the Supreme Court, in which court the following *per curiam* was filed:

“A former judgment obtained by the respondent against the appellant in this case was reversed by this court for an error in the judge’s charge. *Ruane, Administrator, v. Erie Railroad Co.*, 83 N. J. L. 423; affirmed by the Court of Errors and Appeals.

“A second trial between the parties resulted in a verdict for the respondent for \$4,000. The trial judge, on application of appellant, allowed a rule to show cause why the verdict should not be set aside as contrary to the weight of the evidence and excessive, and reserved to the appellant the benefit of an exception taken by it at the trial to the refusal of the court to direct a verdict for the respondent. The rule was subsequently discharged upon the respondent agreeing to accept \$2,500, and judgment was ordered and entered for that amount against appellant. On this appeal the appellant challenges respondent’s right to any recovery against it on the evidence in the cause. The grounds urged by counsel for appellant in the brief for a reversal of the judgment are, firstly, ‘that the plaintiff failed to show that the cause of the accident was the negligence alleged in the complaint,’ and secondly, ‘that the evidence shows that the accident was due to negligence on the part of either the plaintiff’s intestate or a fellow-servant of the plaintiff’s intestate.’

“It is obvious that if either ground is incontrovertibly supported by the evidence, then in the light of a proper application of legal principles the judgment under review must be reversed. The orderly way to a clear exposition of the questions raised and discussed will be to consider, first, what is

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the nature of the negligence that is made the gravamen of the respondent's action.

"The complaint charged that the locomotive engine was carelessly and negligently constructed. There is no proof sustaining this allegation. The complaint further charged that the locomotive engine was so carelessly and negligently inspected and kept in repair and that the appellant employed such negligent and careless persons to perform the duty of keeping the locomotive engine in repair and in safe condition that in consequence of such neglect of duty on part of the appellant, the boiler of the locomotive engine exploded, &c. There was a further allegation that the explosion was the result of appellant putting in use the locomotive engine without first having inspected it to ascertain whether or not it was in a safe condition for use.

"The testimony discloses that the case was tried out by the litigants herein on the issue that the appellant had carelessly put in use a locomotive engine which was defective, out of repair and unfit and unsafe for use, and which condition the appellant might have discovered by a reasonably careful inspection. Morgan was the engineer who operated the locomotive at the time the boiler exploded. This was on the 21st day of October, 1910. Two days prior thereto one Evans ran the locomotive engine from Jersey City to Port Jervis, a distance of eighty-eight miles, and on the trip one of the injectors broke down. Evans says that it appeared to him that the locomotive engine had just come out of the repair shop and had been overhauled. Evans was recalled by the defence, and on his direct examination testified that he reported to the appellant, among other things, that there was some obstruction between the tank and engine, and that the tank needed to be cleaned out and a new strainer to be put in. This report was made on the evening of the 19th of October, and the boiler exploded on the morning of the 21st of the same month. What was done to the locomotive engine during the previous time that it was in the repair shop does not appear.

"Evans testified that the breaking down of the injector indicated that there was trouble in the tank, some obstruction of the flow of water from the tank to the feed pipe.

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"It appears that the function of the injector is that of a pump. It pumps the water from the tank into the boiler. This is accomplished through various tubes which work in combination with the injector. If the tubes in any manner become clogged, such a condition will interfere materially with the flow of water into the boiler. The function of a strainer appears to be to prevent foreign matter getting into the tubes and thus interfere with the flow of water from the tank into the boiler in response to the action of the injector. It further appears that it is essential that the flow of water into the boiler be kept up so as not to let it get below the level of the crown sheet, for the reason that when the water gets below the level of the crown sheet, the crown sheet, being exposed to the heat of the fire, will become overheated and the bolts which keep it in place will loosen and drop out, and as a result it will collapse. In the present case, an examination of the locomotive engine after the explosion showed that the crown sheet had been thus exposed and collapsed.

"The appellant undertook to prove that it made a daily inspection of the locomotive engine, but it nowhere appears in the evidence that the tank was cleaned out and a new strainer put in. Nor does it appear that the obstruction between the tank and engine of which Evans complained was removed.

"The fact that the locomotive engine was sent into the repair shop on the evening of October 19th, and that when it was put into use on the morning of the 21st its boiler exploded, made it a jury question whether the appellant exercised reasonable care in making the repairs of the defects which the engineer, Evans, found to exist and reported to the appellant.

"There was evidence, therefore, from which a jury might have reasonably inferred that no new strainer was supplied, and that the tank was not properly cleaned out, and that such condition might have interfered with the injector and caused insufficient water in the boiler.

"But it is said that Morgan, who operated the locomotive engine on the morning that the explosion took place, was negligent, and that he was at the time a fellow-servant of the

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respondent's intestate, and therefore his negligence must defeat plaintiff's right of recovery.

"It was permissible for the jury to have inferred from Morgan's testimony that he performed the duties devolved upon him as engineer with reasonable care. If it had incontrovertibly appeared that the duties which were incidental to Morgan's employment had been carelessly or negligently performed by him, and that that was the sole cause which led to the explosion and consequent injury and death of the respondent's intestate, then, under the well-settled legal rule enunciated in *Ingebregsten v. North German Lloyd S. Co.*, 57 N. J. L. 400, applicable to fellow-servants, the respondent would have been barred of his right of recovery. But if the master's negligence co-operated with that of the servant in producing the injury and damage, then under an equally well-settled rule of law the respondent would not be debarred of his right to a recovery.

"Now, as there was evidence from which the jury might have legitimately inferred that the appellant failed to supply a new strainer and to clean out the tank, duties which rested upon the appellant in order to make the locomotive engine reasonably safe and fit for use, and that by reason of such failure the proper functions of the injector were interfered with and thereby caused insufficient water in the boiler which led to the exposure and overheating of the crown sheet, its consequent collapse and the explosion; therefore, the motion to direct a verdict for the appellant was properly denied.

"Judgment will be affirmed, with costs."

For the respondent, *George L. Record*.

For the appellant, *Collins & Corbin*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the *per curiam* opinion delivered in the Supreme Court.

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Sessler v. Peter.

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For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, JJ. 10.

For reversal—None.

NICHOLAS SESSLER, PETITIONER-RESPONDENT, v. WILLIAM PETER, TRADING AS LUCAS PETER & SON, DEFENDANT-APPELLANT.

Argued June 27, 1916—Decided October 3, 1916.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

“This was a *certiorari* to test proceedings under the Workmen’s Compensation act in the Essex County Common Pleas, in which judgment was entered for the petitioner. The facts are that Nicholas Sessler, on the 28th day of May, 1914, was in the regular employ of William Peter, a carpenter, doing the duties usually pertaining to that trade. He was struck on the forehead with a piece of timber and was thrown down and rendered unconscious. The court found that the injuries arose out of and in the course of the employment; that the petitioner ‘as a result of said accident is suffering from traumatic neurasthenia and possibly pachymeningitis, and that there is total and temporary disability resulting therefrom.’ The ground of attack is that the finding of facts and the determination of the trial court are not supported by and based upon legal evidence, but after reading the evidence in the case we are satisfied that it was permissible for the court to reach the conclusion stated, and under the case of *Bryant v. Fissell*, 84 N. J. L. 72, this court accepts the findings of the Common Pleas Court upon the

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facts, if there be any legal evidence to warrant them, and in this case, there is such evidence. The judgment of the Common Pleas Court is therefore affirmed, with costs."

For the defendant-appellant, *William Pennington and Frederic C. Ritger*.

For the petitioner-respondent, *McDermott & Enright*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, KALISCH, WHITE, TERHUNE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

THE STATE OF NEW JERSEY, DEFENDANT IN ERROR,
v. FRANK M. BLACK ET AL., PLAINTIFFS IN ERROR.

Submitted July 10, 1916—Decided November 20, 1916,

On appeal from the Supreme Court, whose opinion is reported in 86 N. J. L. 520.

For the plaintiffs in error, *Henry C. Hunt*.

For the defendant in error, *William A. Dolan*.

PER CURIAM.

The Supreme Court in dealing with this case (86 N. J. L. 520) correctly pointed out that the defendant's motion to

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direct an acquittal, made at the close of the state's case, was not renewed at the end of the case. Mr. Justice Kalisch, speaking for the Supreme Court, then proceeded to declare that "even if the motion had been renewed at the end of the case, it would not have availed Curts."

We have not considered the propriety of that declaration because the question is not involved in the decision, and respecting it we express no opinion.

In all other respects we approve of the opinion.

The judgment of the Supreme Court, affirming that of the Sussex Quarter Sessions, will be affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

THE STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
JAMES BOSSONE, PLAINTIFF IN ERROR.

Argued June 23, 1916—Decided November 20, 1916.

On error to the Supreme Court, whose opinion is reported in 88 N. J. L. 45.

For the plaintiff in error, *Thomas P. Fay*.

For the defendant in error, *Charles F. Sexton*.

PER CURIAM.

The judgment of the Supreme Court is affirmed, for the reasons stated in the opinion of Mr. Justice Swayze. One of the questions in the case was the right of counsel to cross-

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examine a witness as to his connection with or commission of particular criminal acts. The questions that were put to one of the state's witnesses were, "You were in the Baff murder case, weren't you?" "How many times have you been arrested for murder?" "Didn't you rob Dr. Maoni's place?" "Did you shoot a push-cart man?" Each of these questions was objected to by the prosecutor and the objections sustained, and these rulings the Supreme Court rightly held to be correct upon the concrete case before it, in which each of the questions put to the witness concerned his relation to a particular criminal act that had no direct bearing upon the question of his veracity.

This disposes of the case before us upon this point, so that any discussion of the discretionary rule that obtains in some jurisdictions when the criminal conduct sought to be inquired into, amounts to a mode of life that has a direct bearing upon the question of veracity would lead to nothing but *dicta* upon a matter that is of too much importance to be hampered by such *obiter* comments.

On the question of the jurisdiction of the Sessions to try the indictment, which it had received under the statute, we think that, regardless of the considerations dealt with in the opinion of the court below, the statute confers such jurisdiction.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

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STATE OF NEW JERSEY, DEFENDANT IN ERROR, v. GASTON CLIFFORD, PLAINTIFF IN ERROR.

Submitted July 10, 1916—Decided December 20, 1916.

On error to the Supreme Court, whose opinion is reported in 88 N. J. L. 458.

For the defendant in error, *William A. Dolan*.

For the plaintiff in error, *Henry C. Hunt*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

THE STATE OF NEW JERSEY, PLAINTIFF IN ERROR, v. WALTER SCOTT, DEFENDANT IN ERROR.

Argued June 20, 21, 1916—Decided December 4, 1916.

On writ of error to the Supreme Court, whose opinion is reported in 88 N. J. L. 551.

For the plaintiff in error, *Martin P. Devlin*.

For the defendant in error, *William B. Mackay, Jr.*

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Veader v. Veader.

PER CURIAM.

For the reasons contained in the opinion filed this term by Mr. Justice Minturn in the case of *State v. George M. Brewster*, ante p. 658, the judgment of the Supreme Court will be reversed and the judgment of conviction of the defendant in the Mercer Sessions will be affirmed.

For affirmance—None.

For reversal—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

SAMUEL VEADER, PLAINTIFF-RESPONDENT, v. FRED
VEADER, DEFENDANT-APPELLANT.

Submitted July 10, 1916—Decided November 20, 1916.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

“This was a replevin suit. It is on appeal by Fred Veader, the defendant, from the judgment of the District Court of Morris county. The subject of the action is the ownership of a horse. This is the second trial of the action. The judgment rendered in the first trial was set aside by this court. *Veader v. Veader*, 87 N. J. L. 140.

“The appeal is based upon the refusal of the trial court to nonsuit the plaintiff and to direct a verdict in favor of the defendant; also on the refusal of the trial court to charge the jury as requested and exception to the charge of the trial judge.

“The first point urged is, that the suit should have been instituted against the defendant in a representative capacity as executor, and failure to do so was the basis for the motion to

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nonsuit and the direction of a verdict in favor of the defendant. The ruling of the trial court on these motions was not error. *Hodge v. Coriell*, 44 N. J. L. 456; *S. C.*, 46 *Id.* 354; *Boyle v. Knauss*, 81 *Id.* 330.

"It is next urged, to use the language of the brief, that the District Court in its charge committed error in passing its opinion and commenting upon the significance of the evidence as making out a *prima facie* case for the plaintiff. The charge must be considered in its entirety. *Brown v. Spence*, 79 N. J. L. 452. We think there is no error in the charge of the trial court.

"The defendant made eleven requests to charge, some of these were, in effect, charged by the court. It is unnecessary to state them in detail. The ninth request was: 'It is the duty and burden on the plaintiff to prove by preponderance of evidence that he was the *absolute* owner of the horse at the time it was claimed by the defendant.' In replevin the plaintiff does not have to prove an absolute ownership. This was an inaccurate legal statement; hence the court was not bound to charge it. The court did charge 'the burden of proof is on the plaintiff to prove that he is entitled to the horse.'

"There is no error in the record. The judgment of the District Court is therefore affirmed, with costs."

For the defendant-appellant, *Elmer W. Romine*.

For the plaintiff-respondent, *King & Vogt*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance — THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal — None.

GEORGE VOORHIS, APPELLANT, v. THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF FRANKLIN, IN THE COUNTY OF BERGEN, RESPONDENT.

Argued June 27, 1916—Decided November 20, 1916.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

"This record shows that August 5th, 1915, the township committee of Franklin township, in Bergen county, were requested to lay out and open a public road which was to run through the land of the prosecutor, and through the land of Forster W. Freeman and J. Miller Nichol, the total length of the road to be about two thousand two hundred and nineteen feet.

"The petition was presented to the committee under chapter 166, *Pamph. L.* 1914, p. 310. On the same day the committee introduced an ordinance for the opening of the road and passed a resolution to meet on September 2d, at two P. M., to receive and consider objections to the improvement, and directed that the clerk give public notice of the fact. A notice was given by the clerk to that effect August 5th, 1915. September 1st, 1915, the prosecutor filed with the committee his objection to the passage of the ordinance.

"The attorneys for the prosecutor and objector, on the day fixed for the hearing, asked for a postponement which was refused. The objection now made is that the ordinance called for a road of thirty feet in width, whereas the law required at least thirty-three.

"The second objection is that no affidavit or proof exists that the notice of a hearing was properly posted.

"As to the reason last urged we have concluded that the act does not require such notice. See section 3, page 311, *Pamph. L.* 1914. It is only after the petition is received and the ordinance introduced that notice is required to be given of the proposed improvement.

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"We do not consider the legislation cited by the prosecutor applicable to this situation, since the proceedings here are taken under a statute which provides a method of procedure in townships. *Pamph. L.* 1914, p. 310.

"The notice required to be given by the statute, after the ordinance has been introduced, affords the required protection to property owners, affected by the proposed improvement. It also appears from the record that notice was posted in five public places as required by the statute.

"It is further urged that the township council passed the ordinance at the meeting held September 2d, 1915, whereas no notice had been given by the township council as to the intention to introduce the ordinance. We find nothing in the statute referred to which requires such notice.

"It is urged that the ordinance was not acted upon at more than one meeting of the township council. We find proof in the case which shows that the ordinance was acted upon at more than one meeting.

"The fourth reason is based upon the refusal of the committee to give the prosecutor a hearing when the ordinance was introduced. The statute does not provide for any hearing at that time. Section 2 of the act provides that the hearing shall be had after the ordinance has been introduced and notice is then required to be given of a time and place of hearing. The ordinance was introduced August 5th, 1915, and the hearing fixed for September 2d, 1915, and there is nothing in the act which would indicate that the legislature contemplated an adjournment.

"The fifth and sixth reasons are that the ordinance does not lay out or open a public road of legal width. We conclude the act of 1914 supersedes the provisions of the General Road act upon the subject, and vests the necessary power for that purpose in the township committee. *Saulsbury v. Gaskin*, 66 N. J. L. 111.

"The seventh reason assigned that the ordinance appropriated private property illegally to public use is without merit, unless it is intended to present the point that it was

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illegally passed, without giving the prosecutor a hearing, which, as we have observed, is not the fact in this case.

"The eighth reason assigned we deem to be without substance. The act makes the township committee the judges as to whether a public necessity for the road exists, where one-half of the property owners affected by the road object. In this case there were objections filed, which we must assume the committee considered, and by the passage of the ordinance the implication is that the township committee deemed the road to be a public necessity.

"The proceedings of the township committee are therefore affirmed."

For the appellant, *Charles B. Dunn*.

For the respondent, *George S. Hilton*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

Walther v. American Paper Co.

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ANNIE C. WALTHER, EXECUTRIX, RESPONDENT, v.
AMERICAN PAPER COMPANY, APPELLANT.

Argued July 5, 1916—Decided November 20, 1916.

On appeal from the Supreme Court.

Proceeding under the Workmen's Compensation act. The decedent was a night watchman in a mill. At nine P. M. he "was making a tour through the mill, recording his passage by ringing in or registering on his watchman's clock, and while going from one station to another stopped to close a door opening from the mill to a loading platform adjacent to a railroad switch. This was a sliding exterior door hung on wheels or pulleys. As Walther leaned down against the handle of the door to roll it shut, he was struck upon the head with a club by a person who had entered the mill and hidden himself behind some rolls of paper near the said door, and near an interior door through which Walther was accustomed to pass in making a tour of the mill. Walther died immediately and the assailant took from Walther's vest pocket his pay envelope containing about \$15. The assailant was an employe of the trustee in bankruptcy at the plant of the American Paper Company, at Bogota, and had been paid off on the said 24th of December, 1914, earlier in the day. After being paid off, he had lost all of his money except fifty cents in a crap game. He knew that Walther had been paid off that day and would probably have the money in his pocket. The assailant's purpose in going to the mill at night and hiding in it was to rob Walther, and he did not attempt any robbery from the office of the mill, or any destruction of the mill property or any mischief or crime other than the robbery of Walther."

For the respondent, *William J. Morrison, Jr.*

For the appellant, *James D. Carpenter.*

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Walther v. American Paper Co.

PER CURIAM.

We think the death of Walther did not arise out of his employment. The case cannot be distinguished in this respect from *Hulley v. Moosbrugger*, 88 N. J. L. 161. We ought to add that our opinion in that case had probably not been published when the present case was decided by the judge of the Common Pleas. He relied on the opinion of the Supreme Court in that case, the reversal of which could hardly have been known publicly at the time. The judgment is reversed.

For affirmance—MINTURN, KALISCH, JJ. 2.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, JJ. 9.

Court of Errors and Appeals of New Jersey.

PUBLIC SERVICE GAS COMPANY, APPELLANT, v. BOARD
OF PUBLIC UTILITY COMMISSIONERS ET AL., RE-
SPONDENTS.

CITY OF PASSAIC, APPELLANT, v. BOARD OF PUBLIC
UTILITY COMMISSIONERS ET AL., RESPONDENTS.

CITY OF PATERSON, APPELLANT, v. BOARD OF PUBLIC
UTILITY COMMISSIONERS ET AL., RESPONDENTS.

ORDER.

It having been called to the attention of the court that, through a mistake, the report of the decision of this court in the above entitled cases appears in the official reports (87 *N. J. L.* 581) under a head-note and indexed by a subject-index statement, indicating that the final decision of this court was exactly the opposite of what it really was in the first of said cases, and that the final decision in the other two cases, wherein the decision of the Supreme Court (reported in 84 *Id.* 463) was reversed, is reported in said official reports (87 *Id.* 705) without any head-note or subject-index reference whatsoever, it is now ordered that there be printed in the volume next to be issued of the official Law Reports a head-note (preceded by the foregoing memorandum to explain its so appearing) and an item in the subject-matter index of said volume under the caption "Public Utilities Rates," as follows, to wit:

1. The special franchises of a public service company are property, but property of a peculiar kind; the right of property in them is not absolute, but is qualified by the right of the state to fix reasonable rates. In determining the reasonableness of rates, no allowance should be made for the value of the special franchise in a case where it is not legally exclusive and where the state still retains the right to fix the rates. See opinion of the Supreme Court, 84 *N. J. L.* 463, and the per curiam affirmance by this court upon that opinion, reported in 87 *Id.* 597.

2. Where, upon the application of a municipality, the Board of Public Utility Commissioners have found the rate charged by a gas company unreasonably high and have in consequence prescribed a lower rate, which lower rate the municipality still thinks unreasonably high, the latter's remedy is by *certiorari* to procure the setting aside of the order fixing such rate, so that the way may be open for the establishment by such board of such still lower rate as shall be proper under the evidence. See the per curiam opinion of this court reported in 87 *N. J. L.* 705.

By the Court: March 20th, 1917,
E. R. WALKER,
C. & P. J.

Endorsed: "Filed March 20th, 1917,
THOMAS F. MARTIN,
Clerk."

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ABORTION.

See CRIMES, 2.
CRIMINAL LAW, 11.

ACCORD AND SATISFACTION.

"Paid and satisfied" in a manufacturer's employer's liability policy of insurance, as applied to a judgment, mean when the judgment is fully paid. The judgment to be paid and satisfied does not necessarily mean canceled of record. *Phila. Pickling Co. v. Maryland Cas. Co.*, 330

ACCOUNT STATED.

1. An account stated may be surcharged and falsified for fraud or mistake. *Vanderveer v. Stat-eair*, 39 N. J. L. 593, approved. *Weir v. Allen*, 597
2. Where suit is brought on an account stated, and both parties concede that there was in fact an account stated, and the controversy is whether it resulted from a compromise, the real issue is not whether there were mistakes in the items, but whether the compromise was one enforceable by law. The necessary elements are the reality of the claim made, the good faith of the compromise, and the extinguishment of the pre-existing claim of the promisee. *Ib.*

ADVERSE POSSESSION.

One claiming title to land by adverse possession must, in an action of ejectment, show that the

possession continued for twenty years and that it was, in fact, adverse, that is, with the intention to claim the fee, indicated by some act on his part which would convert mere occupation of the land into adverse possession. *Myers v. Folkman*, 390

APPEAL AND ERROR.

1. It is a settled rule that a party need not be heard on a point not taken or a matter not raised and considered in the court below. *Ruggles v. Ocean Accident, &c., Corp.*, 180
2. A question not presented and argued in the court below will be held to have been waived and abandoned, and will not be considered in an appellate tribunal. *State v. Heyer*, 187
3. An appellate court will not review matter assigned for error unless the record shows it was assigned for error in the court from whose judgment the appeal was taken. *State v. Shapiro*, 319
4. This court will not consider the question of excessive damages on appeal from a judgment at law; judgments of the inferior law courts are reviewed by this court upon matters of law only. *Klitch v. Betts*, 348

See also DISTRICT COURTS, 1.

ARMORIES.

1. The mere ownership of a proposed armory site gives no standing to the owner to invoke the

*Bills and Notes.**Bridges.*

aid of a writ of *mandamus* to compel the board of freeholders to raise, by a bond issue, moneys to pay the purchase price of land which the state military board, under the power conferred by *Pamph. L. 1913, p. 502*, has contracted to purchase. *Doremus v. Freeholders of Passaic, 197*

2. By the statute creating the state military board (*Pamph. L. 1913, p. 502*), that board is made the state's agent with discretion to determine the advisability of acquiring lands for armory purposes, the place of erection, the price to be paid for it, the character of the building to be erected on it, and to supervise the construction of the same. The right to enforce the obligation of the board of chosen freeholders to issue bonds to raise the money necessary to pay for such armories rests, therefore, in the state board and not in any private citizen who may see fit to interest himself in the matter.

Ib.

BANKRUPTCY.

See PRIVILEGED COMMUNICATIONS, 1, 2.

BILLS AND NOTES.

1. Where, after a note has been delivered and the contract thereby created has been fully consummated, a third party writes on the note over his signature the following irregular endorsement: "This note to be paid out of my estate after my death," that endorsement constitutes a promise to pay the debt of another, and requires a new consideration to support it. *Schaus v. Henry, 607*

2. The defendant's written promise to pay the debt of another has no legal validity, if there be no evidence of consideration outside of the promise itself.

Ib.

BONDS.

See CONSTITUTIONAL LAW, 3.

BRIDGES.

1. Although the Morris Canal and Banking Company is not discharged by its lease to the Lehigh Valley Railroad Company from the obligation to maintain bridges over the canal, imposed by its charter, the lessee took a lease in perpetuity which is equivalent to a title so far as concerns this obligation, and thereby assumed the public burden of maintaining bridges. *State v. Lehigh Valley R. R. Co., 48*
2. The obligation under the charter of the Morris Canal and Banking Company to maintain bridges over the canal is not limited by the necessities of such traffic as existed at the date of its charter, but extends to a case where traffic is increased over a pre-existing highway. *Ib.*
3. The operation of motor vehicles and the improvement of a highway by macadamizing does not affect the charter obligation to maintain bridges over the Morris canal. *Ib.*
4. In order to recover damages caused through an obstruction to navigation by a bridge across a navigable stream in this state, it is not necessary for a plaintiff to plead or prove that the secretary of war has not proceeded under the River and Harbor act of congress, approved March 3d, 1899, to ascertain that the given bridge is an unreasonable obstruction to free navigation. *Chew v. Penna. R. R. Co., 171*
5. The federal "River and Harbor act" (*U. S. Comp. Stat. 1901, p. 3540*) is silent on the subject of closing bridges over navigable streams for the purpose of repair-

Carnal Abuse.

Carriers.

ing, and has not superseded the statutes of this state in that regard. *Newark Express, &c., Co. v. Del., Lack. and W. R. R. Co.*, 494

6. The act of 1892 (*Pamph. L., p. 435*), amending the act respecting bridges, authorizes the obstruction of navigation over navigable streams made necessary by repairs to any bridge or viaduct over the same, and expressly exempts any corporation or person so repairing such bridge or viaduct from liability for damages occasioned by obstructing or stopping navigation thereby, provided such repairs and obstructing be done between February 1st and February 20th. *Ib.*

7. The supplement to the act respecting bridges, enacted in 1896 (*Pamph. L., p. 250*), which fixes the time within which needed repairs, &c., may be lawfully made between November 1st and January 1st, contains a proviso that the act shall not apply to any navigable river or water where the depth where any bridge is erected exceeds four feet six inches at mean high tide. *Held*, that the act of 1896 does not cover the entire subject legislated upon by the act of 1892 (*Pamph. L., p. 435*), and as both statutes are in *pari materia*, the passage of the act of 1896, although it contained a general repealer of all acts inconsistent therewith, did not repeal the act of 1892. *Ib.*

CARNAL ABUSE.

1. Upon the trial of an indictment for a carnal abuse of a female child, it is the right of the accused to prove his reputation for morality current in the neighborhood where he resides, and where it appears that a witness resides in the same neighborhood, it is error injurious to the accused to exclude the testimony of such

witness as to whether he knew such reputation and what it was. *State v. Bloom*, 418

2. Upon trial for carnal abuse of a female child, where the testimony of the prosecutrix tended to show sexual intercourse, it is erroneous to exclude the testimony of the police surgeon, tendered by the accused, as to what he found to be the physical condition of the prosecutrix after the alleged abuse, for while sexual intercourse was not essential to conviction, yet the testimony of the physician, if it had been admitted and had tended to contradict the prosecutrix, would have had a legitimate bearing upon the credibility of the prosecutrix as a witness. *Ib.*

3. Upon trial for carnal abuse of a female child, it is erroneous to exclude the cross-examination of the prosecutrix as to whether she had not said that a man other than the defendant had committed the assault upon her, the question being put and being competent as affecting her credibility as a witness. *Ib.*

4. Upon trial for carnal abuse of a female child, it is erroneous to permit the state to prove other criminal acts of the accused with others than the prosecutrix, not a part of the *res gesta*, and having no logical relation to the crime charged except that they may have all resulted from the criminal disposition of the accused. *Ib.*

CARRIERS.

1. The relation of carrier and passenger, when established, does not terminate until the passenger has reached his destination and alighted from the train upon which he has been riding, and has had a reasonable time and opportunity within which to leave the place where the pas-

*Carriers.**Cases Affirmed.*

- sengers are discharged. *Spoford v. Central R. R. Co.*, 273
2. It is the duty of a railroad company to use reasonable care to provide its passenger a safe place and way to alight at the place of destination, and the company is liable for an accident happening by reason of the neglect of such duty to a passenger who has alighted from a car at rest in a station, and before he has had a reasonable time and opportunity to leave the premises of the company, if the circumstances are such as to induce the passenger to believe that it was safe for him to alight at the place and in the way he did. *Ib.*
 3. Whether a person who has alighted from a standing train at a station, and who is crossing the railway tracks by a planked way provided by the company for that purpose, after the train has moved out, is still a passenger entitled to so cross without looking and listening, is a question of fact for the jury, where, under the proof, reasonable men may differ as to whether he was proceeding from his place of alighting to a place of safety within a reasonable time after he had alighted from the train. *Ib.*
 4. An express company engaged in transporting merchandise for hire is not a "common carrier by railroad" because it contracts with a railroad company for transportation of such merchandise, and therefore is not subject to the provisions of the act of the congress of the United States, relating to the liability of common carriers to their employees in certain cases, approved April 22d, 1908. *Higgins v. Erie R. R. Co.*, 629
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CEMETERIES.

Creditors of a cemetery company, under the general laws relating to cemeteries, have no right to vote at an election of trustees. *Bonynge v. Frank*, 239

See also QUO WARRANTO, 5, 6.
TAXATION, 17, 18.

*Certiorari.**Civil Service.***CERTIORARI.**

Certiorari is a prerogative writ by which the Supreme Court exercises jurisdiction to supervise the proceedings of inferior tribunals and governmental establishments. *Mellor v. Kaighn*, 543

See also TAX SALES, 1.

CHOSEN FREEHOLDERS.

When, under the terms of the act commonly known as the Small Board of Freeholders act (*Pamph. L. 1912, p. 619*), a county adopts the provisions of that statute, all offices previously filled by former boards of freeholders become vacant on the first Monday of January next after the election of the "small board," irrespective of the terms of such offices or under what statutes they have been created. *Earle v. Durham*, 4

See also CONTRACTS, 15.

CITIES.

An appointment by the city clerk of Newark under *Pamph. L. 1907, p. 34*, "by and with the consent of the board of aldermen or common council," does not need the approval of the mayor to render it valid. *Byrne v. Raymond*, 96

See also COMMISSION GOVERNMENT, 1.

CIVIL SERVICE.

1. The recognized legal method of testing the legality or propriety of the actions of the civil service commission in refusing to certify a pay-roll is by *mandamus* and not by *certiorari*. *Brokaw v. Burk*, 132

2. Prosecutors were lawfully in the employ of the city as employees in the sterilization plant. When the sterilization plant was discontinued they were transferred to similar work at the filtration plant. They were afterwards removed from their position because of a ruling of the civil service commission. *Held*, that while the city commission had the power to transfer them to similar work in another place, or to abolish their position, subject to their right to have their names on a special list for reinstatement within two years, yet under the act of 1913, paragraph 4, section 4 (*Pamph. L. p. 836*), they could be removed only for cause, after a hearing. *Ib.*

3. An order of the Civil Service Commission, attempting to adjudicate the title to an office, is absolutely void, and in legal contemplation is as inoperative as if it had never been promulgated. Consequently, such an order is not a proper subject of review by writ of *certiorari*. *Clay v. Civil Service Commission*, 194

4. Where the Civil Service Commission wrongfully refuses to certify a payroll, the remedy for such wrongful refusal is not a writ of *certiorari* to test the soundness of the reasons upon which such refusal is based, but an application for *mandamus* to compel the board to perform the duty imposed upon it by statute. *Ib.*

5. Section 24 of the Civil Service law (*Comp. Stat., p. 3804*), does not tend to protect officers in the police department of a municipality against reduction in rank where such reduction was not the result of discrimination because of their religious or political opinions or affiliation, but was made in the interest of econ-

*Civil Service.**Commission Government.*

omy in the affairs of government.
Durkin v. Newark Fire Com'rs.
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6. The Civil Service act (*Comp. Stat.*, p. 3795) did not take effect in the county of Passaic until after the expiration of forty-five days from November 5th, 1912, the day on which the election was held at which it was adopted by the voters of the municipality. *Steel v. Freeholders of Passaic*, 609

See also OFFICERS, 3, 4.

COMMISSION GOVERNMENT.

1. The Walsh act, as originally passed, required that the votes cast in favor of the adoption of the act equal thirty per cent. of the votes cast for members of the general assembly at the last general election immediately preceding the submission of the act. The amendatory act of 1915 (*Pamph. L.*, p. 12) requires thirty per cent. of the total number of legal ballots cast at the last general election for members of assembly, &c. *Held*, that the number of votes cast in favor of the adoption of the act must equal thirty per cent. of the total number of legal ballots cast in the municipality, regardless of whether or not such votes were cast for a member or members of the assembly, the words "for members of assembly" in the amendatory act being merely descriptive of the particular election referred to. *Schwartz v. Wachlin*, 39
2. When, in cities governed by a commission form of government under *Pamph. L.* 1911, p. 462, it is sought to have an ordinance passed under the provisions of that statute relative to the initiative, the procedure provided by the statute for petitioning for such ordinance must be strictly followed. The affidavit, verifying the signatures to the petition, must be distinct from the paper forming part of the petition; the affidavit must be made by one who has signed the petition; each signer must add to his signature his place of residence, giving the street and number; and the ordinance passed or submitted must be the identical one petitioned for, without alteration. *Buohl v. Beverly*, 378
3. Under the sixteenth section of the Commission Government act (*Pamph. L.* 1911, p. 462) and the supplement of 1915 (*Pamph. L.*, p. 622), regulating the matter of the presentation and passage of an "initiative ordinance," the first step in which is the filing of a petition with the city clerk, signed by fifteen per cent. of the voters of the city at the last general election, it is the duty of the city clerk to examine the petition to ascertain if it conforms to the requirements of the act, and if he determines that the petition does not so conform, he must return it to the agent who filed it for correction, after which correction it may again be filed within ten days of its return. *Ford v. Gilbert*, 482
4. By section 11 of the supplement of 1915 (*Pamph. L.*, p. 630) the clerk is required, if he believes a petition is defective, and before returning it, to present his objections to the justice of the Supreme Court holding the circuit in which the municipality is situated, who is to pass upon such objection summarily, and make an order sustaining or overruling the objection. *Ib.*
5. Where a petition for an "initiative ordinance" was filed with the city clerk, signed by the

Condemnation.

requisite number of voters, and later another petition, signed by some of those who signed the original, was filed, asking that their names be withdrawn therefrom, and the city clerk then certified to the board of commissioners that the petition first filed was insufficient, such action was wholly without authority, and a resolution of the board of commissioners, granting the request of withdrawal, and directing the clerk to strike from the original petition on file the names sought to be withdrawn, will be set aside. *Ib.*

CONDEMNATION.

1. When land is taken by condemnation, trees and top soil thereon are a part of the land. They should not be valued separately and apart from the land by the jury, but may be taken into consideration in determining to what extent if any, the value of the land is thereby enhanced. *Manda, Inc., v. Del., Lack. & W. R. R. Co.,* 327
2. Under the Condemnation act (*Pamph. L. 1900, p. 81, § 6*), the value of the land taken and the damages are to be ascertained, as of the date of the filing of the petition and order thereon. *Ib.*
3. That a city is being furnished with a needed supply of water by a private corporation is not alone sufficient to estop it from taking the water plant for public use under its power of eminent domain, even if it be doubtful that the income to be derived will be sufficient to cover the cost of operation, and taxation may be necessary to supply any deficiency, nor is judicial interference justified upon the ground that such action is, under the circumstances, an unreasonable

Constitutional Law.

exercise of the power of condemnation. *Wood v. Millville,* 646

4. A contract between a water-supply company and a city to supply water to it is property, and may be condemned as an incident to the taking of the property for a public use, and the right of eminent domain may be exercised, if the power has been delegated by the contracting city, for such a proceeding does not impair the contract but appropriates it as property. *Ib.*

CONFLICT OF LAWS.

See JURISDICTION, 1, 2.

CONSIDERATION.

1. When the performance of a contract depends on the continued existence of a given person or thing, a condition is implied that impossibility of performance arising from the perishing of the person or thing shall excuse the performance. *Perlee v. Jeffcott,* 34
2. The owner of a farm gave an option to buy for one year. Five hundred dollars was paid the owner in cash and a note was given him payable in a year for the same amount. Prior to the expiration of the year, the barn, which added substantially to the value of the premises, was struck by lightning and destroyed; the prospective vendee reclaimed the cash paid and failed to pay the note. *Held,* that the cash could not be reclaimed and recovery could not be had on the note. *Ib.*

CONSTITUTIONAL LAW.

1. Chapter 365 of the laws of 1915 (*Pamph. L., p. 677*) is special legislation regulating the inter-

*Contempt.**Contracts.*

- nal affairs of counties and is unconstitutional. *Harris v. Cor-ker*, 31
2. A classification of cities on a basis of population is not in contravention of article 4, section 7, paragraph 11 of the constitution of New Jersey. *Collins v. Sauer*, 139
3. A statute prohibited the entry of a judgment on any bond where a mortgage has or may be given for the same debt, unless, prior to the entry, there shall be filed with the clerk or register of the county in which the mortgaged premises are located, a written notice of the proposed judgment setting forth the court in which it is proposed to enter the judgment, with the place of record of the mortgage and a description of the mortgaged premises. *Held*, that the statute is not unconstitutional when applied to bonds existing before its approval, for it does not impair the obligations of contracts or deprive the holder of any remedy which existed when the contract was made, in violation of the constitution of this state, for it relates to a method of procedure, and does not curtail or restrict a remedy in derogation of the terms of the contract. *Penna. Co. for Ins., &c., v. Marcus*, 633

See also MOTOR VEHICLES.
STATUTES, 1.

CONTEMPT.

1. The power of the Court of Quarter Sessions to punish contempts of court is derived wholly from the common law, which has neither been altered nor enlarged by statute in this state. *In re Verdon*, 16
2. In a summary proceeding for contempt there can be no trial and hence there can be no wit-

nesses against the accused nor a contradiction of his oath by that of others. The proper procedure in such cases is to bring the defendant into court to answer such interrogatories as shall there be exhibited against him. If his answers to the interrogatories show that no contempt has been committed, the party is entitled to his discharge; but if the contempt be admitted, the court shall then proceed to pronounce such judgment as the circumstances may require. *Ib.*

3. The procedure, as laid down by the common law, for the punishment of contempts of court is a part of the substantive law and not a rule of practice. *Ib.*
4. Courts of law can no more at their will adopt the chancery proceeding respecting matters of contempt than they can in any other matters respecting which the two courts radically differ. *Ib.*

CONTRACTS.

1. Where defendant ordered a quantity of steel bars of special lengths over the telephone and afterward confirmed the order by letter, and the plaintiff accepted the order and performed its part of the contract, the defendant cannot thereafter set up in a court of justice as a defence to his breach of the contract that the letter was written under a mistaken understanding by him of what the real contract was, or that it contained statements that he did not intend to make. *Carnegie Steel Co. v. Connelly*, 1
2. Where a contract required, the contractor to erect a garage of specified dimensions, in a suit for damages for failure to perform, it was competent for him to show that he was at all times willing to perform, but that the plaintiff made it impossible by

Contracts.

requiring the contractor to build a garage essentially different from the requirements of the contract. *Held*, that the exclusion of such testimony by the trial court was erroneous. *Ferber v. Cona*, 135

3. Where the owner prevents the contractor from performing, or repudiates his obligations under the contract, communicating such repudiation to the contractor, the latter may treat the contract as abandoned, and thus excuse his non-performance. *Ib.*

4. The plaintiff and defendants entered into a contract in which defendants agreed to excavate sufficient sand for the building of the foundation of a large hotel at an agreed price per cubic foot. After removing several thousand yards of sand the defendants abandoned the work, and in an action against them for breach of their contract defended upon the ground that as plaintiff required, and they had performed, work in addition to that called for by the contract without plaintiffs producing a written order as required by the contract, if any alteration was made in the work, the plaintiff had thereby abrogated the contract and justified their refusal to further perform. It appeared that the additional sand excavated amounted to only twenty-eight cubic yards. *Held*, that such additional work was not an alteration within the meaning of the contract and that the absence of the order was not, in such case, a good defence. *Cramp & Co. v. Doughty*, 288

5. The penalty named in a surety bond is the extent of the obligors' liability in an action on such bond, but the giving of a bond to indemnify a party against loss arising from non-performance of a contract, does not, in an action on the con-

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tract for its non-performance, limit the recovery in that action to the penalty of the bond. The bond indemnifies to the extent of its penalty but is no limitation of the amount to be recovered in a separate action for breach of the original contract. *Ib.*

6. There is no legal liability of an insurance company, to a corporation other than the assured, to whom the policy has been transferred by the assured, after the policy under its terms had expired, under an agreement, by which the assets and liabilities of the assured were transferred to the new corporation. *Phila. Pickling Co. v. Maryland Cas. Co.*, 330

7. Where a railroad company contracts to furnish free storage for a cargo of pebbles pending their reshipment, from time to time as sold, over its lines to customers throughout the country, but the contract does not specify any fixed time for such sales and reshipments, the presumption is that the parties contemplated that the same would take place within what would under all the circumstances be a reasonable time from the commencement of such free storage for the making of such sales and reshipments. *Atlantic Pebble Co. v. Lehigh Valley R. R. Co.*, 336

8. The fact that one party may have expected that this time would be shorter than the other did, does not constitute a failure of the meeting of the minds of the parties necessary to a valid contract. *Ib.*

9. Where a promise has for its subject-matter something which by the terms of the agreement is left to depend for its very existence upon the future election of the promisor, it will not form a valid consideration for an executory contract; but where

Contracts.

such subject-matter, in the normal and *bona fide* course of events as contemplated by both parties, is not thus left dependent, it will form such valid consideration, although there may be elements of quantity, requirement, selection, &c., agreed to be left to the future discretion of the promisor. *Ib.*

10. The executed consideration for a promise is sufficient, if, induced by the request expressed in or properly implied from the promise, it be a benefit to the promisor, or a loss or detriment to the promisee. *Ib.*

11. Where a promise is in effect an offer contemplating acceptance by performance of a certain condition coupled with the entering into of a reciprocal promise by the offeree at the time of such performance, the performance of the condition under the circumstances contemplated, before a withdrawal of the offer, gives rise to a valid executory contract wherein the original promise is supported by the reciprocal promise arising upon the performance of the condition, irrespective of whether such performance is a benefit to the promisor or a detriment to the promisee. *Ib.*

12. The city of O. contracted with M. for the removal of garbage and ashes for four years, and provided that if the contractor after due notice and hearing should be found guilty of a violation of specifications and conditions, the city should be entitled to \$50 for each violation as liquidated damages; and further, that if the work was not performed satisfactorily to the board of commissioners, they might terminate the agreement by resolution; and that the contractor and his surety should then be compelled to pay the cost to the city of finishing the work

Contracts.

for the unexpired time. The city terminated the agreement by resolution, of which the contractor had notice, and made a contract with another concern for the removal of garbage and ashes. *Held*, that the resolution was not within the provisions of section 6 of the Commission Government act (*Pamph. L. 1912, p. 649*), which is intended only to apply to original contracts, and not mere subsidiary contracts provided for by the terms of the original contract, as in this instance. *Held, also*, that it was legal to insert in the contract a provision for its termination, even if the statute did not, in express language, authorize such a provision, as details must be left to the municipality. *Held, further*, that prosecutor was not entitled to be heard before the passage of the resolution terminating the contract, no such requirement being inserted in the contract. *Moriarty v. Orange*, 385

13. A parol assignment of a chose in action based on contract, whether such chose in action be evidenced by writing or not, is assignable at law and the assignee may sue thereon in his own name. *Jemison v. Tindall*, 429

14. Plaintiff owed a commission for sale of her real estate under a contract with three persons who acted as her brokers, and paid the whole to one of them who receipted for all. The two others having recovered a judgment against plaintiff, claiming that she was not discharged by such payment, she paid the judgment and took an assignment by parol of their claim against the third. *Held*, that she was entitled to recover back such part of the money originally paid to him as represented the claim of the other two on a division of the commission. *Ib.*

*Contracts.**Contracts.*

15. A resolution passed by a board of chosen freeholders provided that an award of a contract for the improvement of a county road be not binding, if chapter 285 of the laws of 1916 was adopted by the voters of the state; that, in the event said law was adopted by the voters of the state, the award and all the proceedings shall be null and void. The resolution was passed November 8th, 1916. The above act was adopted by the voters of the state at the election, November 7th, 1916. On November 24th, 1916, at a special meeting of the board, the above resolution was repealed, disposed of, set aside and for nothing holden. A contract was awarded under the original advertisement for bids. *Held*, the award of the contract was void and illegal. *Godfrey v. Freeholders of Atlantic*, 511
16. The plaintiff was injured while in the employ of a copartnership and was induced to forbear bringing suit by an offer, as he says, of a life job. At his demand this offer was put in writing. Nothing was said as to the wages to be paid or any other term of the employment. *Held*, that the writing was not sufficiently definite to make an enforceable contract. *Bird v. J. L. Prescott Co.*, 591
17. A copartnership by which plaintiff was employed was succeeded by a corporation which took over all the assets and assumed certain of the liabilities, not including any liability to the plaintiff. The plaintiff continued at work, his pay was increased, and he was paid by the corporation. In 1913 his employment by the corporation was terminated; whether by his voluntary act or by his discharge was disputed; the plaintiff never tendered himself ready to work for the partnership after he began to work for the corporation. *Held*, that there was no proof of breach of contract by the copartnership. *Id.*
18. Where there was testimony to show that defendant offered plaintiff \$75 a month to work for him as manager of a hotel, and that for a period of time thereafter the plaintiff performed the services of manager, the trial judge was warranted in finding that the plaintiff had accepted the offer of the defendant and had performed services under an express contract. *Pusey v. Moore*, 675
19. The construction and effect of a written instrument is a matter of law, to be determined by the court and not by the jury. But when the construction of a written instrument depends upon extrinsic facts, as to which there is a dispute, its construction is a mixed question of law and fact, and presents a jury question under proper instructions from the court. *Sommer Faucet Co. v. Commercial Casualty Ins. Co.*, 693
20. What are "repairs usual and necessary to the care and maintenance of the premises," "all usual or special operations incident thereto," or "unusual alteration or repair of premises" in a manufacturer's public liability policy of insurance, as applied to the repair of a platform on the premises, presents a jury question. The refusal to nonsuit or direct a verdict by the trial court was not error. *Id.*
- See also* **BILLS AND NOTES**, 1, 2.
CONSIDERATION, 1, 2.
DURESS, 5, 6.
GARBAGE AND ASHES, 1, 2.
MANDAMUS, 2.
PRACTICE ACT, 3.
STREET RAILWAYS, 1, 2, 3.

Corporations.

Criminal Law.

CORPORATIONS.

A writ of *mandamus* will not issue to compel trustees *de facto* of a corporation to call an election for trustees where the title *de jure* of the trustees *de facto* is disputed. *Quo warranto* is the proper proceeding in such a case. *Smith v. Trustees Bethel A. M. E. Church*, 397

CRIMES.

1. Section 70a of the act entitled "An act for the punishment of crimes (Revision, 1898)," (*Comp. Stat.*, p. 1769), declares it to be a misdemeanor to purchase certain articles therein described from any minor under the age of sixteen years which may have been stolen. *Held*, that in the prosecution of a defendant under this statute, it is not necessary to prove that the purchaser knew that the goods had been stolen. It is sufficient if it appears that the goods were purchased from a minor under the age of sixteen years, and that they were stolen. *State v. Seritella*, 127

2. Section 119 of the Crimes act makes it a criminal offence for any person, who maliciously or without lawful justification with intent to cause or procure the miscarriage of a woman pregnant with child, "shall advise her to take or swallow any poison, drug, medicine or noxious thing." *Held*, that the collocation of the four prohibited agencies being disjunctive, an indictment is sufficient which charges the administering of a "drug" alone, without any allegation of the administering of any of the other three prohibited agencies, to wit, "poison, medicine or noxious thing." *State v. Mandeville*, 228

See also CARNAL ABUSE, 1, 2, 3, 4.

CRIMINAL LAW.

1. By the Crimes act of this state it is a criminal offence for any person maliciously, or without lawful justification, and with intent to cause and procure the miscarriage of a woman pregnant with child, to administer to her, or prescribe for her, or advise or direct her to take or swallow any drug, medicine or noxious thing, &c., and it is immaterial in determining the guilt of one charged with a violation of this statutory provision whether the woman upon whom the offence is committed was or was not then "quick with child." *State v. Loomis*, 8

2. The defendant was charged with counseling and procuring another to disobey a subpoena to testify in a case pending in Chancery; all the defendant's acts were committed outside the county in which the indictment was found; the state sought to hold him as a principal in the misdemeanor because the facts averred as is said showed the commission of a crime within the county by the person subpoenaed. *Held*, that to sustain the indictment there must be found in it a statement of facts which would constitute a misdemeanor by the latter, and that it was not sufficient to aver that he had been duly and legally served with a subpoena, without averring what witness fee, if any, had been paid him and facts showing that the amount was the proper amount; the averment of due and legal service is a mere legal conclusion. *State v. Dudley*, 42

3. The name of a person necessary for the description of a crime, if known, must be stated in the indictment. *State v. Smith*, 52

4. Where the indictment contains an averment of an illegal sale of liquors to persons unknown

*Criminal Law.**Criminal Law.*

- to the grand jury, it is improper on the trial to admit evidence as to sales made to them of persons who were subpoenaed to testify or testified before the grand jury, but are not named in the indictment. *Ib.*
5. Where an indictment charges illegal sale of liquors to a person named and to others not named, and evidence as to sales to the latter is improperly admitted, the judgment must be reversed and the record remitted for a new trial. The defendant is not entitled to be discharged. *Ib.*
6. When a defendant pleads guilty to a criminal offence charged in an indictment—or an allegation when that is preferred upon indictment being waived—he cannot avoid the consequences of his plea and reverse the judgment entered upon it by showing that the preliminary complaint before the magistrate recited a name as that of his accuser other than that in the indictment or allegation, and also because the complaint was signed with still another name—being neither the one in the caption of the complaint nor the one used in the indictment or allegation; and especially so when no such question was raised in the trial court. *State v. Heyer*, 187
7. To aver that a man forcibly and against the will of a female did carnally know her, is the same as to aver that he carnally knew her forcibly and against her will. There is no statute or rule of law prescribing the order in which these collocations of words shall precede and follow one another in an indictment or allegation. *Ib.*
8. In an indictment or allegation for rape it is not necessary to charge that the offence was committed forcibly and against the will of the woman. It is sufficient if it charges that the defendant feloniously did ravish and carnally know her. *Ib.*
9. An allegation for rape (indictment being waived) examined and held, construing its several phrases together and reading them in connection with one another, that, in fact, it charges the defendant with carnal knowledge of a certain woman forcibly and against her will. *Ib.*
10. A person accused of crime is not entitled to the benefit of counsel to advise him as to whether or not he shall confess, but only for defence, and when the record in a criminal case does not disclose whether the defendant was of ability to procure counsel or whether he requested that counsel be assigned to him, it will be assumed that he failed to invoke the privilege. *Ib.*
11. Where the date of the offence in a criminal prosecution is not of the essence of the offence, it is always open to the state to offer proof that the offence charged was committed on any day within the period covered by the statute of limitations; but the date on which the offence was committed may relatively become, like any other fact in a case, a matter of vital importance. So, where a physician was charged with unlawfully using instruments upon a deceased woman to effect an abortion, on the 15th day of January, and the defence interposed was that the first and only occasion on which an instrument was used upon deceased by defendant was on January 27th, and then under such circumstances as legally justified the act, and it was not contended by the state that what the defendant did on January 27th was unlawful, it was error for the trial court to charge the jury that it

*Criminal Procedure.**Damages.*

- was their duty to find the defendant guilty under the indictment, even though they found that January 15th was not the correct date, but some other date at or about that time, was when defendant first introduced the instrument into the person of the deceased, the practical effect of the instruction being that the jury must convict defendant even though the instrument was used for a justifiable cause. *State v. Shapiro*, 319
12. To constitute robbery there must be actual violence, or such a demonstration or threats as will create reasonable apprehension of bodily injury if the victim resists. *State v. McDonald*, 421
13. A conviction in a criminal case will not be reversed for error in an instruction which could not have prejudiced the defendant. *Ib.*
14. One indicted for a crime may be convicted of any offence of a lower degree, provided such lower offence is necessarily included in the higher one charged in the indictment. *Ib.*
15. Robbery is larceny with the element of force or fear entering into it. *Ib.*
16. Larceny is a necessary ingredient of the crime of robbery, and a conviction of the former crime may be had under an indictment for the latter. *Ib.*
- of its existence and acted upon that suspicion in order to show an intent to produce a miscarriage. *State v. Loomis*, 8
2. A statement to the jury by the trial court in a criminal case, as to what the prosecution claimed the proofs showed with relation to a material fact in the case, is not legally objectionable. *Ib.*
3. When a person who is charged with an offence triable before the Court of Quarter Sessions, waives indictment and trial by jury and requests to be tried immediately before the court, it is not necessary for the judge to sign an order in writing for the trial of the accused. *State v. Heyer*, 187
4. The "grounds for reversal" required by section 136 of the Criminal Procedure act must point out the specific action complained of as erroneous or injurious. *State v. Rubertone*, 285
5. In drawing a jury in a criminal case, from a special panel, the requirements of section 27 and of section 83 of the Criminal Procedure act should be strictly followed; and it is error to draw a jury from the box which contains only the names of a part of those who constituted the special panel. *State v. Rombolo*, 565

DAMAGES.

1. In an action for breach of warranty on a sale of fertilizers, the plaintiff was allowed to recover, under the instruction of the court, the difference between what the crop produced by the fertilizer actually was worth and what it would have been worth had the fertilizer been up to the warranty, and also the difference between the price paid for the

See also EVIDENCE, 7.
PROCESS, 1, 2.

CRIMINAL PROCEDURE.

1. On the trial of an indictment for this statutory offence, it is sufficient for the state to prove that pregnancy existed and that the defendant had a suspicion

*Deceit.**Descent.*

fertilizer and what it was actually worth. *Held*, that such instruction was erroneous in that it permitted a double recovery; the difference in value of the crop produced and that which would have been produced had the fertilizer been as warranted being the full measure of the defendant's liability. *Stuart v. Burlington County Farmers' Exchange*, 12

2. A railroad conductor took up a commutation ticket presented by Miss I. H. G., which was issued in the name of Mr. I. H. G. She sued to recover damages resulting from the failure of the company's ticket agent to deliver to her a commutation ticket for which she had asked and paid. There was no testimony whatever which tended to show any commotion in the car or that the plaintiff was made a spectacle of when the conductor took up the ticket. *Held*, that the trial judge erred in charging the jury that the plaintiff was entitled to recover for indignity inflicted upon her in having the ticket taken away. *Held, further*, that, in the absence of proof of indignity or the like, the true measure of damages was the value of the ticket in question at the time it was taken up. *Gerety v. N. Y. & N. J. R. R. Co.*, 175

3. In a suit for damages for refusal to register a transfer of stock, the rule of damages depends on the nature of the action. If the plaintiff claims special damages only and seeks to retain the stock, he is not allowed to recover the value and also to retain the title. If, however, he claims for a conversion of the stock, he may recover its value. *Siegel v. Riverside Box and Lumber Co.*, 595

4. In an action to recover damages for refusal to register a trans-

fer of stock, there was no proof of the value of the stock, and there was evidence that it had been originally issued without being in fact fully paid, that the corporation had not been prosperous and was conducted at a loss. *Held*, that it was error to direct a verdict for the par value of the stock with interest. *Id.*

See also RECOURPMENT, 1, 2.

DECEIT.

In an action of deceit for the purchase of stock in a company, claimed to have been induced by false representations as to its value, it is not enough for the plaintiff to prove that the company, the stock of which he purchased, possessed assets, but the value of the assets must be shown, as an element from which the jury can estimate the damages. A nonsuit by the trial court, for the lack of such proof, is not error. *Bingham v. Fish*, 688

DESCENT.

1. Where a testator devised certain lands for life to his wife, and made no disposition of the remainder, the undisposed of estate descended to his heirs-at-law, in this case four first cousins, to the exclusion of one referred to in another connection in the will as the testator's adopted daughter. *Dorsett v. Vought*, 303

2. The fact that the testator took into his family a girl of tender years, but never formally adopted her according to law, but referred to her in his will as his adopted daughter, will not accord to her the *status* of an adopted child, so as to clothe her with the legal right of inheritance, in

Desertion.

the absence of proof that she was legally adopted. *Ib.*

DESERTION.

1. The defendant was indicted under section 73a of the Crimes act (*Comp. Stat.*, p. 1770) for desertion and willful refusal or neglect to provide for and maintain his wife and minor child. He had been arrested for carnal abuse and married the complaining witness. At the time, no home having been prepared, the wife acquiesced in an arrangement that she, with their baby (born before the marriage), should go temporarily to the home of her parents and the defendant to his parents. From that time forward the defendant persistently refused to recognize, live with, or provide for and maintain his wife and child, although he had the physical and financial ability so to do. He contributed nothing to their support except to send the wife a money order occasionally for an entirely inadequate sum, although the wife repeatedly called upon the defendant (who lived in the same neighborhood) to begin matrimonial cohabitation and to provide a home and support for her and his child. *Held*, that a motion for an acquittal, upon the ground that a violation of the statute was not shown, was properly refused. *State v. Vreeland*, 423
2. Where a separation is shown to have originated with the wife's consent, it will become desertion from the time the wife makes sincere overtures to terminate it. *Ib.*
3. To constitute desertion upon the part of the husband, it is not necessary that the intent to desert should have been formed at the time of the separation, but it is sufficient if he afterwards de-

District Courts.

termines to desert and persists in such determination. *Ib.*

DISORDERLY HOUSE.

The habitual violation of the statute making it a misdemeanor to sell or give intoxicating liquors to minors under the age of eighteen years, constitutes the place where such sales take place a disorderly house. *State v. Koettgen*, 678

DISTRICT COURTS.

1. On appeal from the District Court, the Supreme Court will not reverse a judgment because of the action of the trial judge in dismissing the jury and granting a continuance after the commencement of the trial, unless such action is plainly erroneous and is a clear abuse of the trial court's discretion. *Crossley v. Connolly Co.*, 55
2. When a jury in the District Court, summoned on the demand of the defendant, has for good cause been discharged by the court and the trial continued for one week, the defendant is not entitled to a jury at the trial on the adjourned day unless he pays or tenders the cost of a new venire. *Ib.*
3. Under section 149 of the District Court act as amended (*Pamph. L.* 1913, p. 619), a notice in writing to the clerk that the party demands a venire for a jury to try the cause on a specified date, which was the return day of the summons, is not operative as a general demand of a jury trial on any date whereon such trial is held. *Consolidated Gas., &c., Eng. Co. v. Blanda*, 104
4. Since the amendment of 1910 to section 30 of the District Court

*District Courts.**Duress.*

- act, District Courts have had jurisdiction to try causes wherein the title to land is in question, within the limits set by that section as amended. *Eisler v. Halperin*, 278
5. Where a summons in a District Court was endorsed with plaintiff's demand, and the state of demand was then filed, and notice of such filing served upon defendant—*Held*, that the trial court, in the absence of defendant, and without his knowledge or consent, could not order judgment entered for a sum greater than that contained in the process and state of demand. *Drake v. Mowder*, 306
6. The supplement of 1916 (*Pamph. L.*, p. 385) to the District Court act, makes no change of the requirement of the act of 1905 (*Comp. Stat.*, p. 1957, pl. 13b) that where there is a stenographer, the transcript shall be certified for appeal within fifteen days after judgment. *Berstecher v. Caruso*, 426
7. The requirement of said supplement of 1916 that the state of the case where there was a stenographer shall be filed in the Supreme Court on or before the opening day of the next term following the date of filing the appeal, refers to the term next after the actual date of filing and not merely after the last day when appeal might have been filed. *Ib.*
8. On *certiorari* of a District Court judgment after trial where there is a dispute as to what occurred in reference to the trial and there are contradictory certificates of the trial judge, his final certificate in response to a rule of court is taken as truly stating the facts. *Perth Amboy City Market v. Baum*, 614
9. A District Court has no power to adjourn indefinitely a trial partly finished, and afterward to award judgment without notice to the party against whom it is to be rendered or opportunity to conclude the trial. *Ib.*
- See also* RECOUPMENT, 2.

DURESS.

1. Duress, for which a person may void a contract or recover back money paid under its influence, exists where one by an unlawful act of the beneficiary or his authorized agent, or by the act of some person with his knowledge, is constrained under circumstances which deprive him of the exercise of free will to agree to, or to perform, the act sought to be avoided. *Koewing v. West Orange*, 539
2. The collection of taxes through threats by the authorities of a municipality to which they are owing, that unless the sum due is paid the owner's right to redeem will be barred or foreclosed, does not amount to unlawful coercion and is not duress. *Ib.*
3. Payment is not rendered involuntary merely because the payer at the time makes a protest against the payment, and if money is paid under compulsion no protest is necessary to lay the foundation of an action to recover it; but, if there be doubt as to whether the payment was voluntary, the protest may be taken into account in determining that question. *Ib.*
4. A voluntary payment cannot be recovered by the payer. *Ib.*
5. A contract, made by a sister, because of a threat to subject her brother to imprisonment, is void for duress; and the question whether or not, in view of con-

Dying Declarations.

flicting testimony, there was such a threat, is one for the jury. *Travis v. Unkart*, 571

6. Duress, to be available as a defence in an action upon contract, must have been exercised upon him or her who sets it up as a defence by him who claims the benefit of the contract, or by someone acting in his behalf or with his knowledge. *Id.*

DYING DECLARATIONS.

Where a dying declaration is offered in evidence, the preliminary question of fact whether the declarant was under a sense of impending death is for the determination of the trial court; but when the declaration has been admitted, the questions of fact as to what the declarant said and what his mental and physical condition were at the time are for the jury. *State v. Bovino*, 586

EASEMENTS.

See GRADE CROSSINGS, 26.

EJECTMENT.

In this case, which is an action of ejectment, in which both parties to the suit relied upon a paper title, the testimony and exhibits being examined—*Held*, the verdict of the jury in favor of the defendant was not against the weight of the evidence. *Post Mortgage and Land Co. v. Davis*, 516

See also EVIDENCE, 12, 13, 14.

ELECTIONS.

1. Under the provisions of the act regulating elections, the board of county canvassers ordinarily is required to canvass the returns

Elections.

as laid before them by the various local boards, but where a doubt appears from the return as to its correctness, it is proper to have the local board certify what are the correct figures. *In re Board of Election*, 382

2. At an election held in a municipality to determine whether it would adopt an act providing for a different form of government, a majority of the votes cast favored the adoption but the act only became operative if the votes cast in favor of the act equaled at least thirty per centum of the total number of legal ballots cast in the municipality at the last general election for members of assembly. The votes cast in favor of the adoption did not equal the thirty per centum required, so that the act did not become operative. The statute further provided that if a majority of the votes cast were not in favor of the act then it should remain inoperative and no further proceedings should be taken until after the beginning of the last year of the term of the mayor elected following the rejection of the act, after which another election could be had. *Held*, that where a majority of the votes were cast in favor of the adoption of the act, it did not become operative because it failed to receive the thirty per centum of the votes cast at the last general election, the limitation concerning another election did not apply because that condition is only applicable when a majority of the votes are not cast in favor of the adoption. *Vollmer v. Wachlin*, 440

3. Section 159 of the act concerning elections (*Comp. Stat.*, p. 2125), providing a procedure to obtain a recount of the votes cast at an election, applies to a contest in an election for member of congress from this state. *Carson v. Scully*, 458

*Error.**Evidence.*

4. *Held, also*, that the petition for a recount set out sufficient facts to warrant an order for a recount, under *Kearns v. Edwards*, 28 *Atl. Rep.* 723, and that the petition was properly verified, under *Johnson v. Allen*, 55 *N. J. L.* 400, 401. *Id.*

EMBLEMETS.

See LANDLORD AND TENANT, 3.

ERROR.

It is reversible error for the trial court, during the progress of a trial, on an indictment for keeping a disorderly house, to strike from the record parts of the testimony of a witness and to direct the jury to pay no attention to such testimony, on the ground that it is not worthy of belief, at the same time ordering the witness to be taken into custody by a constable in the presence of the jury. *State v. Terry*, 522

EVIDENCE.

1. The law will not permit the introduction of evidence by the defendant to show that information given by him to the plaintiff, and intended as the basis of action by the latter, and which has in fact been acted upon in conformity thereto, was unintentionally untrue, where the object is to throw a loss upon the plaintiff, who has changed his position, relying on the truth of such statements. *Carnegie Steel Co. v. Connelly*, 1
2. An indictment charged a director of a trust company with overdrawing his account in violation of the Crimes act. *Comp. Stat.*, p. 1796, § 171. The overdraft was charged to have taken place on August 9th, 1913. The defendant had left with the sec-

retary of the trust company three notes of a third party for sale to country banks. The secretary had credited the defendant's account on July 17th, 1913, with the proceeds of one of the notes. *Held*, that it was error to allow the secretary to testify that the note was not submitted to the board of directors before it was purchased, since the indictment did not charge a violation of section 15 of the Trust Companies act. *Comp. Stat.*, p. 5661. *State v. Foster*, 45

3. When a witness denies any recollection of a relevant conversation, it is proper on cross-examination to ask him what he said at a later time, either by way of stimulating his memory or of discrediting him. *Id.*
4. The rule which does not permit a party to impeach one of her own witnesses does not preclude her from proving the truth of any particular fact by competent testimony in direct contradiction of that to which any of the witnesses called by her may have testified; and a party testifying is in the same position in this regard as that of any witness not a party, and a jury may well conclude that a party had made a mistake as to a fact as well as any other witness, and if upon the whole matter the jury is of opinion that the plaintiff or defendant has proved the case, then the verdict should be for that party, although it rests upon testimony contrary to that given by the party and despite the fact that the party gave testimony which might preclude a recovery, as the mistake of a plaintiff or defendant cannot change facts proved by other witnesses. *Schreiber v. Pub. Serv. Ry. Co.*, 183
5. Where defendants, who had been sworn in as deputy sheriffs

Evidence.

to protect a manufacturing plant during a strike of its employes, were on trial for the killing of a man during an altercation with a mob of strikers, it was error to exclude testimony of previous rioting and disorder among the strikers which had been continuous for some time previous to the shooting, since such evidence would tend to show that the deputies believed that some of the employes, whom it was their duty to protect, were in danger of attack, and also since such evidence would have a bearing on the contention that the mob, and not the deputies, were the real aggressors and that the deputies acted in self-defence. *State v. Bavier*, 214

6. On the trial of a man for murder of his wife by poison with morphine or laudanum, it was proper to admit evidence (1) of a physician who made the *post mortem* examination that the condition of the brain and blood led him to suspect poison; (2) of a chemist that a jar handed him contained a liquid "said to be the stomach contents" of one whose death was attributed to poison, where the liquid was proved by witnesses from whom the chemist received his information to be what it was said to be; (3) of a chemist who had examined the contents of the deceased's stomach as to the quantity of morphine or laudanum that was likely in the system of the deceased or in the stomach prior to death; (4) to show defendant's relations with another woman and his effort to resume sexual relations with her just before his wife's death; (5) that there was a lack of any appearance of grief on his part at his wife's death; (6) of an expert witness as to what portion of four grams of morphine or opium would likely be absorbed through the system; (7) it was

Evidence.

also proper to cross-examine the defendant as to whether he had expressed the pleasure he had had in his intercourse with the other woman, and upon his denial, to call the witness to contradict him. *State v. Crivelli*, 259

7. In a prosecution for statutory carnal abuse, evidence of specific acts of sexual intercourse by the female with other men is incompetent unless the state tenders the issue that a child was born of an act of intercourse charged against the defendant, in which case defendant is entitled to meet that issue by evidence of intercourse with other men at a time when such child might have been conceived. *State v. Rubertone*, 285
8. The plaintiff's testimony showed in detail, from memory, his daily and weekly receipts and profits from his business as a huckster, upon which data he based an estimate of his loss. *Held*, admissible; the credibility of the witness and the value of his estimate under the circumstances being for the jury to determine. *Rabinowitz v. Hawthorne*, 308
9. An assignment by a corporation is duly proven by the testimony of the subscribing witness, who knows the president of the corporation, who saw him sign, who knows the seal of the corporation and saw it affixed. *Beachner v. Jengo*, 325
10. An admission that the money sued for is due is competent evidence unless made without prejudice, or unless the party making the admission has been led to believe, by the conduct of the adversary, that a compromise may probably be effected. *Id.*
11. In a suit to recover the proceeds of certain pension checks, endorsed by deceased during his

Evidence.

- lifetime to defendant, evidence to prove a verbal statement made by the deceased, not in the presence of the defendant and not contemporaneous with the giving of any check, where the object of such testimony was to show, by deceased's declaration, that the checks had not been endorsed to the defendant as a gift, is inadmissible. *Veader v. Veader*, 399
12. A paper-writing, which recites that "in consideration of a better business feeling and to avoid future litigation between us do quit-claim," &c., endorsed "Quit-claim and settlement of lines," has none of the elements of a deed. It was not error to admit such a paper-writing in evidence on the ground that it was not recorded in accordance with the Conveyances act. *Comp. Stat., p. 1553, § 54. Post Mortgage and Land Co. v. Davis*, 516
13. It was not error to admit in evidence a copy of a referee's report and rule for judgment in the Supreme Court, endorsed by the clerk, as a true copy, certified under the hand of the clerk and seal of the court, April 8th, 1806. *Ib.*
14. In this case it was not error to admit in evidence a non-recorded deed. The fact that a deed was not recorded does not destroy its evidential value. A non-recorded deed is only void as against parties claiming under another conveyance from the same grantor, who took without notice of the unrecorded instrument. *Comp. Stat., p. 1553, § 54. Ib.*
15. Where the record of a previous conviction of defendant, for a crime committed in another state, is offered in evidence pursuant to section 1 of the Evidence act (*Comp. Stat., p. 2217*), full faith and credit must

Executions.

- be given to it when properly certified, even though it contains matters which would form no part of a judgment record made up in accordance with our own rules and regulations. *State v. Rombolo*, 565
16. A photograph, which was said to have been taken of defendant while incarcerated in a reformatory, upon the back of which were endorsements stating that the original thereof was in confinement under a charge of burglary, has no probative force; the endorsements thereon are hearsay, and, consequently, it cannot be introduced in evidence. *Ib.*
17. A witness may be contradicted or impeached by testimony previously given by him before the grand jury. The case of *Imlay v. Rogers*, 7 N. J. L. 347, overruled. *State v. Bovino*, 586
18. Where a witness has volunteered testimony inimical to the party that called him, contrary statements by the witness made elsewhere may be shown, not for the purpose of impeaching the witness, but for the purpose of neutralizing the effect of his testimony. *Ib.*
19. The fact of age is not within the category of things as to which the fact can be proven by opinion testimony, since such evidence is not the best proof of which the fact of age is susceptible. *State v. Koettgen*, 678
- See also CARNAL ABUSE, 1, 2, 3, 4.
CONTRACTS, 2.
DYING DECLARATIONS.
- EXECUTIONS.
1. The act of April 12th, 1915 (*Pamph. L., p. 470*), providing that when a judgment has been recovered and where an execution thereon has been returned

Fines.

unsatisfied, the judgment creditor may apply to the court and secure an order for execution against the salary, &c., of the judgment debtor, applies as well to judgments recovered and executions returned prior to the passage of the act as those after. *Petersen v. Jersey City*, 93

2. The act of April 12th, 1915 (*Pamph. L.*, p. 470), permits of an execution against the salary of a municipal officer. *Ib.*

FEDERAL EMPLOYERS' LIABILITY ACT.

See MASTER AND SERVANT, 8.

FINES.

Fines paid upon conviction for the violation of a city ordinance, subsequently set aside by the appellate court, cannot be recovered back when such fines were paid without protest, and two forms of appeal were available to the defendants, as alternatives to paying the fines or serving time in jail. *D'Aloia v. Summit*, 154

FIRE AND POLICE.

1. The act of 1914 (*Pamph. L.*, p. 422), empowering any municipality, governed by a board of commissioners or improvement commission, to establish a full-paid or part-paid fire department, is unconstitutional, in that by its limitation a department of public service, common to all municipalities, and in nowise peculiar to any specific municipality, is delimited in use to a particular class of municipality, and the act is a special and local law in that respect. *Wygant v. Hackensack Imp't Com.*, 454
2. The ordinance under review, creating a part-paid fire department

Fraud.

in Hackensack, while not valid under the act of 1914 (*Pamph. L.*, p. 422), may be sustained because authorized under the provisions of an act approved March 9th, 1882 (*Pamph. L.*, p. 80; *Comp. Stat.*, p. 5501). *Ib.*

FOREST FIRES.

Under section 11 of an act entitled "An act for the appointment of firewardens, the prevention of forest fires, and the repeal of sundry acts relating thereto," approved April 18th, 1906, as amended by *Pamph. L.* 1911, p. 56, any person who sets fire to, or causes to be burned, any forest land, comes within the condemnation of the statute, irrespective of whether his act in so doing is in the execution of a preconceived purpose, or whether it is wholly unintentional. *Conservation and Development Bd. v. Veeder*, 561

FRAUD.

1. The defence of fraud in the execution of a written instrument is available even though the defendant had ability and opportunity to read it, where the situation is such that the signer is under no duty to read. *McDonald v. Central R. R. Co.*, 251
2. Where a release under seal is relied on as a defence, fraud in the consideration of the release is not available as a defence at law; there must be fraud in the execution to sustain the defence. *Connor v. Dundee Chemical Works*, 50 N. J. L. 257, approved. *Ib.*
3. A fraudulent misrepresentation of the contents of a release whereby the releasor is induced to execute it, is fraud in the execution of the release even though the misrepresentation is

Garbage and Ashes.

as to the statement of the consideration contained in the release. *Ib.*

FREE PASSES.

See RAILROADS, 2.

GARBAGE AND ASHES.

1. A city incorporated under *Pamph. L. 1902, p. 284*, has no power, after it has made a contract for the removal and disposal of garbage, to purchase a plant in aid of the contractor or to issue bonds to raise the money to pay therefor. *Riddle v. Atlantic City*, 122
2. Such a contract must be let to the lowest responsible bidder, and where the invitation to bidders does not provide for it, a subsequent arrangement under which the city is to purchase a plant and machinery and turn over the machinery, without the cost, to the successful bidder, is giving an unfair advantage to one bidder over the others. In such case the contract, as changed, has not been awarded to the lowest bidder in any legal sense, and an ordinance which undertakes to make the purchase for such purpose is *ultra vires*. *Ib.*

See also CONTRACTS, 12.

GRADE CROSSINGS.

1. The act of 1913 (*Pamph. L., p. 91*), known as the Fielder Grade Crossing act, is not confined in its operation to a single crossing, but in a proper case may include one or more crossings in the same petition. *Erie R. R. Co. v. Public Utility Commissioners*, 57
2. The Supreme Court, upon *certiorari*, or under section 38 of

Grade Crossings.

- the act of 1911 (*Pamph. L., p. 374*), can review the action of the board of public utility commissioners in ordering an alteration of the grade of a highway with a steam railroad, for the purpose of ascertaining whether or not such order is purely arbitrary; whether or not it has a reasonable basis to rest upon; whether or not it is supported to any extent by the facts submitted to the board for its consideration. *Ib.*
3. The evidence in the record is sufficient to support the findings of the board that such crossings are dangerous to public safety or the public travel is impeded, being the jurisdictional facts. *Ib.*
 4. *Quære*. Upon the review of such an order, can additional testimony be taken under the provisions of the *Certiorari* act? *Ib.*
 5. The word "impede" in this statute means to place obstructions in the way of; obstruct; hinder; as, to impede progress. It is synonymous with check, hinder, delay. *Ib.*
 6. The Erie Railroad Company, as the lessee of the Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company, is "the company operating such railroad" within the meaning of the statute. The order of the board of public utility commissioners was properly directed against the prosecutor, the Erie Railroad Company. The dangerous conditions, to the elimination of which the act is directed, are the result of the operation of the railroad by the Erie Railroad Company. *Ib.*
 7. The statute provides the board of public utility commissioners "may" order the company op-

Grade Crossings.

erating such railroad, &c., to alter the crossing. As to the prosecutor, the statute is mandatory. The prosecutor is not concerned with what might happen to someone else. When, in a statute, the word "may" means must or shall. *Ib.*

8. Where the work is in itself a reasonable, proper and fair exaction, when considered with reference to the object to be obtained, the expense is not a reason against its legality, when the order for such work is based upon and made in an exercise of the police power, which is a part of the reserved power of the state. *Ib.*

9. The Fielder act (*Pamph. L. 1913, p. 91, ch. 57*) authorizes the public utility board, in a proper case, to order a railroad company to alter grade crossings according to plans to be approved by the board, by substituting therefor crossings not at grade, either by carrying the highway under or over the railroad, or by reconstructing the railroad under or over the highway, or by vacating, relocating or changing the lines, width, direction or location of the highway and the opening of a new highway in the place of the one vacated, and this includes the power to order such changes in the property and facilities of the railroad company as are fairly incidental to, or rendered necessary by, the alteration of the crossings. *Ib.*

10. An order of the public utility board made pursuant to the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), which is confined in its direction to the railroad company to the alteration of the crossings by changing the highways and by reconstructing the railroad, and by performing such work as is required thereby, does not require the company to

Grade Crossings.

make changes in private sidings and the like, not its property, and not within the limits of the right of way. *Ib.*

11. Where an order of the public utility board for the elimination of grade crossings under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*) is confined in its direction to the railroad company to the alteration of the crossings by changing the highways and by reconstructing the railroad and by performing such work as is required thereby, a change in the location of a station building not fairly incidental to, nor rendered necessary by, the changing of the highways or the reconstruction of the railroad, is not required by such order. *Ib.*

12. An order of the public utility board for the elimination of grade crossings under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), which is confined in its directions to the railroad company to the alteration of the crossings by changing the highways and by reconstructing the railroad and by performing such work as is required thereby, does not require the construction by the railroad company of structures upon its lands for the use of private parties in substitution for structures now occupied by them as lessees, and which will be rendered useless by the elimination work. *Ib.*

13. Where the order of the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*) for the elimination of grade crossings directs the street railway company to pay ten per centum of the expense of the changes required by the order directly chargeable to the crossings used by it, that being the maximum amount allowed by the statute, the steam railroad company cannot complain that the

*Grade Crossings.**Grade Crossings.*

street railway company was not ordered to pay more. *Ib.*

14. An order made by the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), requiring the railroad company to make changes in the existing and remaining streets in respect to grade, width and structure, and to make other changes by the abolition of existing crossings and the substitution of other crossings therefor on new highways, is not invalid by reason of such requirements, it appearing that such changes are all fairly incidental to, and were rendered necessary by, the separation of grades, having reference to the interests of the railroad company as well as those of all the people who have occasion to cross the railroad. *Ib.*

15. Section 13 of the General Railroad act, as amended by *Pamph. L. 1914, p. 490*, confers upon a railroad company power to take by condemnation any land or property required for the purpose of complying with an order made by the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), and the owners of property to be taken have no right to be made parties to, or to demand a hearing in, the proceedings under the Fielder act. *Ib.*

16. The provisions of the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*) are applicable alike to highways existing at the time of the construction of the railroad and to highways subsequently laid out. *Ib.*

17. An order made by the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), requiring the railroad company to make changes in the highways outside of its right of way at its own expense, is valid

in respect to such requirement, it appearing that such changes are fairly incidental to the changes ordered in the crossings at the railroad. *Ib.*

18. The Supreme Court, upon review by *certiorari* of an order of the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*), will not disturb the action of the board in adopting plans of its own rather than those suggested by the railroad company unless such action was unreasonable, or based upon some illegal principle, or lacks evidential support. *Ib.*

19. The fact that an order made by the public utility board under the Fielder act (*Pamph. L. 1913, p. 91, ch. 57*) makes no provision for such modification of the details of the plans as may become necessary during the progress of the work, is no reason for setting aside the order. There is a reasonable presumption in favor of the plans adopted, and the board may at any time, for good reasons, properly modify its order. *Ib.*

20. Statutory requirements enacted by the legislature for public safety under the police power of the state are not a taking of private property for public use without just compensation, although conformity to such requirements involves expense. *Ib.*

21. Railroad corporations may in the exercise of the police power by the legislature be required at their own expense not only to abolish grade crossings that existed when the railroad was constructed, but also to carry their tracks over highways laid out since the construction of the railroad or to carry such highways over their tracks; and the expense of such permanent improvement of the railroad property may be imposed by the legislature

Grade Crossings.

upon the railroad corporation operating such railroad without violating any constitutional provision. *Ib.*

22. A statutory requirement for the abolition of grade crossings is neither unconstitutional or unreasonable because it does not affirmatively authorize the railroad company to lessen or eliminate the danger at such crossing by decreasing the number of its train movements. *Ib.*

23. The object of a law must, by force of the constitution, be single and be expressed in its title; but the methods of attaining such object and the matters relating thereto, which may be as various as such object requires, need be expressed in the terms of the enactment only. *Ib.*

24. Any contract that a railroad corporation is empowered by the state to enter into is made subject to the future exercise by the state of its police power; and hence the obligations of such contracts are not in a constitutional sense impaired by such future legislation. *Ib.*

25. A state statute requiring the elimination of dangerous grade crossings is an exercise of the police power that is within the scope of the local law, and is not an interference with interstate commerce in the present state of federal legislation upon that subject. *Ib.*

26. The supplement to "An act concerning public utilities," approved March 12th, 1913 (Fielder act), is not an invasion of the exclusive jurisdiction of the Court of Chancery to regulate conflicting public easements. *Ib.*

27. The Fielder act does not impair the *mandamus* power of the Supreme Court. *Ib.*

See also PUBLIC UTILITIES ACT, 1.

Highways.

HIGHWAYS.

1. Under chapter 156 of the laws of 1915, now no longer a part of the statute (*Pamph. L. 1916, p. 49*), a pedestrian crossing a street at a place other than a cross-walk is barred from maintaining an action against an owner of a vehicle not himself driving, for damages caused by a collision, but is not barred as against a driver of the vehicle whether owner thereof or servant of the owner. *Schreiner v. Grinnell*, 37

2. The plaintiff-respondent and defendant-appellant entered into an agreement which provided, *inter alia*, that the express company assumed all risks of injuries to person or property of any employees, exclusively in its service while upon the premises of the railroad company, and agreed to indemnify and save the railroad company harmless from all claims that might be made against it, and from all loss, damage and expense that might be so incurred by it, as well as against the expense of resisting any such claims, whether successfully resisted or not, it being understood that the railroad company should not, under any circumstances, be responsible or liable for any such loss, damage or injury. Thereafter two actions were instituted against the plaintiff by father and son for injuries to the latter, a minor, who, while in the exclusive employ of the express company and while driving one of its wagons from the express building to the company's stable after he had completed his work for the day, was injured by being thrown out of the wagon, which was run into by one of the railroad company's locomotives on its tracks where they crossed at grade a passageway maintained by it which had all of the appearances of a pub-

Highways.

lic street, upon which the boy was present by implied invitation from the railroad company. Judgments were recovered against the railroad company by the father and son in appropriate actions, and the company also expended certain moneys in resisting the actions. These judgments, and the sum so expended, were paid by the railroad company, and it then brought suit to recover under the contract mentioned. A jury being waived, the case was tried upon an agreed state of facts before a circuit judge who found for the plaintiff and against the defendant and awarded judgment for the full amount claimed. *Held*, correct. *Central R. R. Co. v. Morgan*, 165

3. A landowner who invites others to use a private way owned by him as though it were a public street, and under the belief that it is such, owes to them as such owner no greater duty than that owed by the public to one using a highway. *Reaney v. Central R. R. Co.*, 282

4. The circumstance that new elements of locomotion, such as electricity, steam, &c., have been added to vehicles using public highways has not wrought any modification in the legal principle that the driver of a vehicle has no superior legal right in the use of the highway over a pedestrian in the exercise of a lawful right to cross the highway, but that the law imposes reciprocal obligations to use reasonable care. *Pool v. Brown*, 314

See also BRIDGES, 3.

HUSBAND AND WIFE.

See DESERTION, 1, 2, 3.

INDICTMENTS.

See CRIMINAL LAW, 3, 4, 5.

Inheritance Tax.

INHERITANCE TAX.

1. Stocks in New Jersey corporations, pledged by a non-resident during his lifetime as collateral security for a note, are not subject to the transfer tax at his death under the act of 1914 (*Pamph. L.*, p. 267), imposing a tax on such shares when transferred by will or intestate laws, since the rights of the unpaid pledgee in the stocks did not permit of a transfer of the stocks by the will of the deceased pledgor. *Security Trust Co. v. Edwards*, 396
2. The Inheritance Tax law (*Pamph. L.* 1909, p. 325), as amended (*Pamph. L.* 1914, p. 267), is a succession and not a property tax, and does not violate any provision of the federal or state constitutions intended to secure equality of rights. *Maxwell v. Edwards*, 446
3. The act of April 9th, 1914 (*Pamph. L.*, p. 267), amending the Inheritance Tax law (*Pamph. L.* 1909, p. 325), if discriminatory at all, discriminates when considered with cognate legislation in favor of the non-resident, and, although it does not produce absolute equality, it is a workable rule, and a step in the evolution making for practical equality of taxation in so far as such equality can be evolved under our dual system of government, and is therefore valid. *Id.*
4. The true meaning of section 4 of the Inheritance Tax act (*Pamph. L.* 1914, p. 269), dealing with exemptions and the imposition of a graduated transfer tax upon decedents' estates, is that (1) the first \$5,000 shall be exempt, (2) the next \$45,000 shall be subject to a tax of one per cent., (3) the next \$100,000 shall be subject to a tax of one and one-half per cent., (4) the next \$100,-

*Instructions to Juries.**Labor.*

000, shall be subject to a tax of two per cent., and (5) all the amount over \$250,000 shall be subject to a tax of three per cent. *Torrance v. Edwards*, 507

INITIATIVE.

See COMMISSION GOVERNMENT, 2.

INSTRUCTIONS TO JURIES.

1. Assuming that a request that the plaintiff must satisfy the jury, by a preponderance of the testimony that an accident happened as she described, referred to all evidence adduced on her behalf, and was therefore good, nevertheless an addition in the request that if the accident happened in any other way than as testified to by the plaintiff herself, she cannot recover, is erroneous. *Schreiber v. Pub. Serv. Ry. Co.*, 183
2. Where an instruction asked for is partly good and partly bad, it is proper to refuse it altogether: and it is not error to refuse to charge a request containing several propositions, if any of them are unfounded. *Ib.*
3. A charge, in reply to the jury's question whether they must accept circumstantial evidence, that they must accept all evidence, coupled with the charge that it was a question of what they believed of the testimony, was proper. *State v. Crivelli*, 259

INTOXICATING LIQUORS.

The provision of the Inns and Tavern act of 1913 (*Pamph. L.*, p. 574), providing that "whenever the ratio between the population of any city, town, township, borough or village, and the number of licensed places situate therein for such sale of said

liquors shall exceed the ratio of five hundred to one, additional licenses for sale of such liquors therein * * * may be issued," &c., expressly excludes from its provisions hotels containing upwards of fifty spare rooms and beds. Consequently, the number of such licensed hotels having upwards of fifty spare rooms and beds cannot be taken into consideration in computing the ratio of the licensed places to the population, since the provision of the statute is only intended to regulate the number of inns and taverns having less than fifty spare rooms and beds. *Fort v. Common Pleas of Monmouth*, 144

JURISDICTION.

1. The state courts have jurisdiction in actions brought independently of the federal statutes for some wrong done, where the federal statutes come incidentally into operation by reason of some regulatory provision contained therein and where the action itself is brought neither for a violation or enforcement of the federal statute nor for the purpose of assailing the validity or legal efficacy of the provisions of the federal statute. *Kells Mill and Lumber Co. v. Penna. R. R. Co.*, 490
2. An action of replevin may be brought in a state court to recover certain goods in the custody of a carrier, although the goods were shipped from one state to another, and the demurrage charges, by reason of the refusal to pay which led the carrier to refuse delivery, were governed by tariffs filed with the interstate commerce commission under the federal statute. *Ib.*

LABOR.

1. In enacting the Workmen's Compensation act and declaring

*Landlord and Tenant.**Malicious Prosecution.*

that every contract of hiring made subsequent to its going into effect shall be presumed to have been made with reference to the act, &c., the legislature must have had in mind contracts which were valid in law, or at least contracts which were not prohibited by statute; hence, where an infant thirteen years of age was employed in a factory, in direct contravention of the provisions of chapter 64 of the laws of 1904 (*Pamph. L.*, p. 152), and was injured while so employed, the scheme of compensation provided by the Workmen's Compensation act in no wise applies, and the common law liability of the employer to compensate the employee for injuries alleged to have been caused by the negligence of the master is not affected thereby. *Hetzel, Jr., v. Wasson Piston Ring Co.*, 201

2. A father who has allowed his son, under the age of fourteen, to work in a factory in violation of the statute prohibiting the employment of children under the age of fourteen in factories, cannot recover from the employer damages resulting from injuries received by the son which arose out of the employment. *Hetzel, Sr., v. Wasson Piston Ring Co.*, 205

LANDLORD AND TENANT.

1. Upon a *certiorari* to review a judgment of a District Court summarily dispossessing a tenant, the only question to be considered is whether the District Court had jurisdiction, and in considering this question the Supreme Court cannot review the findings of facts, but can only determine whether there was any evidence from which the jurisdictional facts might have been found. *Moreland v. Steen*, 383

2. Judgment of dispossession in such case might result in turning the tenant out of possession, while the purchaser at the tax sale, who was not a party to the proceeding, would be entitled to possession rather than the landlord, but this difficulty can be met by controlling the writ of possession. *Id.*

3. The well-settled law that upon the termination of a tenancy by its own limitation or by voluntary act of the tenant, in the absence of a special custom, there is no right of emblements, applies as well to tenancies which have been terminated between seed time and harvest with the consent of the landlord. *O'Leary v. Harris*, 671

See also TAX SALES, 2.

LARCENY.

See CRIMINAL LAW, 16.

MALICIOUS PROSECUTION.

1. Webb, the secretary, superintendent and manager of a manufacturing corporation, caused the arrest of the plaintiffs, two former employees of the company, for the larceny of certain articles, the property of the company, found in their possession. The plaintiffs claimed that Webb had given them these articles, but of this claim the corporation had no actual notice. The plaintiffs were tried and acquitted of the charge, and they then brought an action against the company for malicious prosecution. Webb had no express authority, nor had he any implied authority to give away the property of the company, and the gift, if made, was a personal matter between him and the plaintiffs, and so knowledge of the gift was a fact not imputable to the corpora-

Malicious Prosecution.

tion. The other facts, knowledge of which by Webb was imputable to the company, in the absence of notice that plaintiffs claimed the articles by gift from Webb, were such as to create a probable cause for the company to believe that the plaintiffs were guilty of larceny. *Hardorn v. Webb Mfg. Co.*, 262

2. Where the facts are not in dispute, the question of probable cause, in actions for malicious prosecution, is one of law. *Ib.*
3. The fundamental grounds upon which an action for malicious prosecution rests are that it was instituted against the plaintiff without reasonable or probable cause; and that the defendant was actuated by a malicious motive in making the charge. Unless the evidence in the case establishes the existence of both of these grounds, the plaintiff's suit must fail. *Vladar v. Klopman*, 575
4. Where, in a suit for damages for malicious prosecution, the question whether or not the defendant had probable cause for instituting the prosecution against the plaintiff depends, in part at least, upon facts the existence of which are in dispute, it is the function of the jury to settle those facts, and, upon doing so, to determine on the whole case whether or not probable cause has been shown, such determination being based upon proper instructions from the trial court. But where the facts are not controverted, the question of probable cause is one of law, to be determined by the court, and its submission to the jury is improper. *Ib.*

MANDAMUS.

1. The writ of *mandamus* will ordinarily not be awarded when such award will create disorder

Mandamus.

or confusion, or injuriously affect the rights of third persons. *McCormick v. New Brunswick*, 117

2. The questions raised in this case being such as should have been raised promptly by a writ of *certiorari* attacking a contract for a public improvement—*Held*, that *mandamus* to assess the expense of such improvement should be denied where it appeared that it would involve a determination as to the legality of the contract after the improvement was completed and the contract price paid. *Ib.*
3. When a rule to show cause why a peremptory writ of *mandamus* should not issue has been made absolute, and after such decision was announced, the respondents, for the purpose of reviewing it, obtained leave to frame pleadings upon which a final judgment might appear on the record, the return in such fictitious pleadings to the alternative writ must aver no fact and must tender no issue as to any fact that was not before the court at the time the decision to be reviewed was pronounced. *Hamilton Twp. v. Mercer County Traction Co.*, 163
4. The right of a citizen to the issue of a prerogative writ is only recognized when it is apparent that the public convenience, or interest, will be subserved by the remedy desired. *Doremus v. Freeholders of Passaic*, 197
5. Courts of law will not interfere by *mandamus* to compel a voluntary unincorporated association to receive into their social relationships one who is personally disagreeable to them, whether for a good or a bad reason, when no property rights are involved. *Frank v. Nat. Alliance of Bill Posters*, 380

*Master and Servant.**Master and Servant.*

See also ARMORIES, 1, 2.
CORPORATIONS.
GRADE CROSSINGS, 27.

MASTER AND SERVANT.

1. Where plaintiff's general employment was that of running a train and his special employment was as fireman, and there was evidence to show that in emergencies firemen were accustomed to perform the duties of a brakeman, it was too narrow a definition of the word "employment" to hold that a fireman, acting in an emergency in the capacity of brakeman, was a volunteer, since such duties were a part of his general employment of running the train. *Hendee v. Wildwood, Del. Bay, &c., R. R. Co.*, 32
2. For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given and the circumstances under which the act is done, the master is responsible. *Klitch v. Betts*, 348
3. Where a servant is acting within the scope of his employment, and by his negligence causes injury to a third party, the master will be responsible, although the servant's act was contrary to his master's orders. *Ib.*
4. Where the act of a servant is a willful one, not expressly or impliedly within the line of the servant's duty or employment, entirely disconnected therefrom, done, not as a means, or for the purpose of performing the master's work, the master is not re-

sponsible for such act of the servant. *Ward v. Erie R. R. Co.*, 525

5. The above rule applied in this case, where it appears the defendant's watchman or detective shot the plaintiff as he approached the watchman on defendant's property, without any notice or reason for such shooting. *Held*, it was error not to grant a motion to nonsuit or direct a verdict in favor of the defendant, the master. *Ib.*
6. An employe assumes the risk of such dangers attending the prosecution of his work as he knows, or could discover by the exercise of ordinary care for his personal safety, and for hurt happening to him from those dangers, the employer is not responsible. Distinction between contributory negligence and assumption of risk pointed out. *Cetola v. Lehigh Valley R. R. Co.*, 691
7. Where, as a part of its operating system, a common carrier by railroad in interstate commerce has provided, and notified its employes of, a rule that in the "movement of trains" when "cars are pushed by an engine," a man shall take "a conspicuous position on the front end of the leading car to signal the engineman in case of need," and an employe, so notified of the rule, who, in the performance of his duties, has, in reliance upon the rule, placed himself two hundred feet in front of a long train of empty freight cars not being "drilled" and standing on a track not used for "drilling" purposes, without engine or crew, is run down because a train crew attached an engine to the far end of the train and without warning pushed it over him, without a man being placed on the front end of the leading car in accordance with the rule, the question of the negligence of

*Marims.**Motor Vehicles.*

- the train crew, the common carrier's employes, was properly left to the jury. Citing *D'Agostino v. Pennsylvania Railroad Co.*, 72 N. J. L. 358, and *Germanus v. Lehigh Valley Railroad Co.*, 74 Id. 662. *Willever v. Del., Lack. and W. R. R. Co.*, 697
8. The "assumption of risk" of a section-gang foreman engaged in interstate commerce in the employ of a common carrier by railroad, whose duty it is to look out for the safety of himself as well as of the men under him, does not include the negligence of his fellow-employees under the Federal Employers' Liability act in failing to take a precaution or give a warning provided with his knowledge, to secure his safety by the system adopted by his employer for the operation of the railroad upon which he worked. Distinguishing *Precodnick v. Lehigh Valley Railroad Co.*, 74 N. J. L. 566. *Ib.*
2. A structure of frame and iron attached to land, and designed for professional baseball purposes, and consisting of a grandstand, roofed, floored and in parts enclosed, containing club houses, dressing, bath, heating, locker and toilet rooms, refreshment booths, offices, stairs and seats; bleacher stands having flooring, seats and toilet rooms; and high, tight board fences enclosing the playing field and physically connected with the stands, is a "building" within the meaning of the term as used in section 1 of the Mechanics' Lien law. *Comp. Stat.*, p. 3291. *Ib.*
3. In a mechanics' lien suit the whole claim is not vitiated because of one or more items improperly set out in the bill of particulars, if the good and bad items are not inseparably blended. *Rizzolo v. Poysher.*, 618
4. A general statement in the bill of particulars of a mechanics' lien claim that the work was done by contract at a price mentioned is sufficient. *Ib.*
5. Where an architect wrongfully refuses to issue certificates of completion of work, it is not necessary to show that the owner participated in the wrongful refusal, in order to sustain an allegation of fraud, based upon such refusal. *Ib.*
- MAXIMS.
- Quod non apparet non est*, 238
- Rcs ipsa loquitur*, 345
- Respondeat superior*, 351
- Damnum absque injuria*, 656
- Argumentum ab inconvenienti*, 664

MECHANICS' LIEN.

1. By the term "building" as used in section 1 of the Mechanics' Lien law (*Comp. Stat.*, p. 3291) is meant "An edifice constructed for use or convenience as a house, a church, a shop, &c., attached to and becoming a part of the land itself." *Rabb v. Ellison, Inc.*, 416

MORTGAGES.

See CONSTITUTIONAL LAW, 3.

MOTOR VEHICLES.

Chapter 136 of the session laws of 1916 (*Pamph. L.*, p. 283), regulating the operation of auto buses, or jitneys, in cities of this state, which requires as a

*Municipal Corporations.**Negligence.*

prerequisite to municipal consent to such operation the filing of a bond by the owners of such vehicles against bodily injury or death as a result of an accident occasioned by the operation of such vehicles in the public streets, and the imposition of a tax on gross receipts of five per cent., does not violate the fourteenth amendment to the federal constitution requiring equal protection of the laws. *West v. Asbury Park*, 402

MUNICIPAL CORPORATIONS.

(POWERS, LIABILITIES, &c.)

When a meeting of a municipal body is regularly held for the purpose of filling an appointment to an office, the term of the incumbent of which has expired, and no decision is reached at such meeting but an adjournment is had, the adjourned meeting is a continuation of the first, and the election held at such meeting is as of the date of the first meeting. *Collins v. Sauer*, 139

NAVIGATION.

See BRIDGES, 5, 6, 7.

NEGOTIABLE INSTRUMENTS.

1. Where one makes a promissory note payable to his own order for the accommodation of another, and endorses it to the person for whose accommodation it was made, the maker may, in an action by such accommodation holder, set up a failure of consideration. *First National Bank of Roselle v. Dorrval*, 298

2. If, in an action on a promissory note against the maker, there is evidence to show that the note was made for the accommodation of one not a party to the note, the proceeds, however, to

be used to redeem his property, and not for the accommodation of the holder who advances the money, a finding by the trial court in accordance with such testimony will not be reversed on appeal because there is contrary evidence tending to show that the note was made and delivered for the accommodation of the holder, for the weight of the testimony is not subject to review on appeal. *Id.*

NEGLECT.

1. A request which would exclude from the consideration of the jury any question of negligence on the part of defendant in stopping its car in a certain place, and of such negligence being a producing cause of accident to plaintiff, was rightly refused, as the jury were justified in finding for plaintiff even though not satisfied that the car started while she attempted to board it, there being evidence to support the conclusion that the accident resulted from the stopping of the car in a place of danger and that it was not contributed to by any neglect on the part of the plaintiff to use care for her own safety. *Schreiber v. Pub. Serv. Ry. Co.*, 183

2. Where the evidence showed that the plaintiff suffered injury by reason of a combination of elements creating a situation calling for the exercise of some care on the part of the carrier for the safe exit of the plaintiff from its train, and that the defendant exercised no degree of care, a nonsuit was error. *Gore v. Del., Lack. and W. R. R. Co.*, 224

3. Plaintiff while in the act of crossing a street intersection with his horse and wagon was struck by an automobile driven by defendant. *Held*, under conflicting accounts of the circumstances at-

Negligence.

tending the accident, the question of negligence of the defendant and the contributory negligence of the plaintiff were for the jury. *Rabinowitz v. Hawthorne*, 308

4. Where there was testimony that the plaintiff attempted to cross a street between two standing vehicles which obstructed his view for some distance, and that after he had reached a point where he had a view to both north and south, he looked to the north and saw a slow moving wagon about thirty or forty feet away and then looked to the south and saw nothing approaching, whereupon he took a step forward about three feet, when he was struck by defendant's automobile coming from the north, which gave no signal or warning of its approach—*Held*, that the question of the negligence of the defendant and the contributory negligence of the plaintiff was for the jury. *Pool v. Brown*, 314

5. In an action for the board of horses where defendant relies upon a counter-claim based upon the loss of a brood mare, injured in the pasture field of plaintiff, no legal error is committed by the trial court in refusing a requested instruction, setting forth in effect that since the injury occurred while the mare was under the care and control of plaintiff, there arose from this situation a presumption of negligence upon plaintiff's part, and that the burden is therefore imposed upon him to overcome that presumption by preponderance of evidence sufficient to satisfy the jury that the injury was not caused by negligence on his part. *Fanshawe v. Rawlins*, 344

6. Backing an automobile out into a street, without warning to other users of the street, including the plaintiff, who was in-

Negligence.

jured while riding a motorcycle by coming into collision with another automobile in an attempt to avoid the automobile backing. The defendant's negligence and the plaintiff's contributory negligence are questions of fact to be decided by a jury. It was not error for the trial court to refuse a motion to nonsuit the plaintiff or direct a verdict for the defendant. *Pyers v. Tiers*, 520

7. Plaintiff drove an automobile at a speed of fifteen miles an hour in a heavy snowstorm on trolley tracks covered with about two feet of snow on a two per cent. down grade, that is, a vertical drop of two feet in every one hundred lineal feet, with snow beating in his eyes through a slight opening in the windshield, which permitted him to see no farther than twenty-five feet ahead, knowing that a trolley car was likely to approach him head-on from the opposite direction, and which he was looking for; which automobile, so then and there traveling, it appears, could not be stopped within forty-five feet, although he himself did not know within what distance he could have stopped it—when a trolley car appeared within the range of his vision, so limited, coming toward him at a speed of eight miles an hour, without giving any audible signal, and with which he collided, notwithstanding he did what he could to stop his automobile by working the clutch and brakes; and, as a result of the collision, his automobile was damaged and he himself was injured. *Held*, that plaintiff was guilty of contributory negligence, and, therefore, not entitled to recover. *Savage v. Pub. Serv. Ry. Co.*, 555

8. One who, while riding in the private automobile of another, is injured by the negligence of a

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third party, may recover against the latter, notwithstanding that the negligence of the driver of the automobile contributes to the injury, where the person injured is without fault and had no authority over the driver. *Lange v. N. Y., Susq. & W. R. R. Co.*, 604

9. If one injured by the negligence of a third party had no authority over the driver with whom he was riding, and was not negligent himself, and the relation of master and servant, or principal and agent, or mutual responsibility in a common enterprise did not exist, then the negligence of the driver cannot be imputed to him. *Ib.*

10. In an action to recover for the death of a person, while riding with another, through the negligence of a third party, it is not error justifying reversal for the trial judge to charge incidentally that "if decedent had no authority over the driver, and was not negligent himself, and the relation of master and servant, or principal and agent, or mutual responsibility in a common enterprise did not exist, then the negligence of the driver is not imputable to the decedent," even though there was no evidence of such relation, it appearing that the judge charged in effect that there was no such relation, and limited a finding of contributory negligence, if any, to want of reasonable care upon the part of the decedent himself. *Ib.*

11. The plaintiff's intestate was the servant of an express company, and in the performance of his service was drawing a truck along the platform of a railroad company so near its edge that the rear of the truck was struck by a passing engine and the collision caused him to be thrown under it, which ran over and

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killed him. He had been in the service long enough to know that engines were constantly passing along the rails next to the platform, which was of sufficient width to allow him to keep the truck beyond the danger of being struck by that part of the engine which ordinarily overlaps the edge of the platform, and the accident happened because the deceased was pulling the truck within the range of that part of the engine which usually overlaps a properly constructed platform. *Held*, that the negligence of the deceased contributed to the accident and the railroad company was not liable. *Higgins v. Erie R. R. Co.*, 629

12. Plaintiff, a middle-aged woman, entered defendant's store to make purchases, and while following one of the saleswomen to the place where a desired article was, fell down a pair of stairs, which she did not see and of the existence of which she had no knowledge. Since under the evidence it was permissible for the jury to draw either of two inferences, that the saleswoman, in passing, opened the gate leading to the stairs to let the plaintiff follow her, or that the gate was found open and left so by the saleswoman, the question whether the defendant exercised reasonable care to keep and maintain its store in a reasonably safe condition, and the question whether the plaintiff used reasonable care for her own safety, were jury questions. *Deronet v. Woolworth Co.*, 669

See also HIGHWAYS, 4.
STREET RAILWAYS, 4.

OFFICERS.

1. An unauthorized person who gains possession of a public office by force, and with full knowledge that his title thereto is

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disputed by the lawful incumbent, has no right of action against the public for the prescribed salary during such usurpation. *Gaskill v. Atlantic City*, 269

2. The prosecutor was appointed to the office of city clerk of Atlantic City, for one year at a stated salary, and held the office without reappointment for three years, when he was superseded by another. He contests the legality of the appointment of his successor upon the ground that, being a veteran of the Spanish-American war, he cannot be removed under the provisions of the act of 1907, chapter 14, without good cause, and after a fair and impartial hearing. *Held*, that the act of 1907 applies only to officials holding an office, whose term was not fixed by law at the time of the passage and approval of the act. *Bell v. Atlantic City*, 443

3. The act of March 24th, 1885 (*Pamph. L.*, p. 130), prescribing that certain officers and men employed by municipal authority in the fire department of any city shall hold their respective offices during good behavior, efficiency and residence in such city, does not prohibit the reduction in rank of such officials for reasons of economy in the service. *Durkin v. Newark Fire Com'rs*, 468

4. In section 1 of *Pamph. L.* 1906, p. 429 (*Comp. Stat.*, p. 2402, pl. 298), which provides, among other things, that battalion chiefs shall hold their office or employment during good behavior and shall be removed for cause after a hearing or opportunity therefor is afforded, the word "cause" in the statute does not necessarily mean one of the causes designated in *Pamph. L.* 1885, p. 130. Consequently, in a city having a fire department

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organized under the authority of *Pamph. L.* 1885, p. 326, an official in the fire department may be reduced in rank in the interests of the economical administration of the department, when done in good faith to promote the efficiency of the service, although it may displace some men whose positions are secured to them during good behavior. *Id.*

See also CITIES, 1.
CIVIL SERVICE, 5.

PARDONS.

In view of the fact that the provisions of *Pamph. L.* 1916, p. 576, gives to the jury the power to fix the punishment of one convicted by them of first degree murder at either life imprisonment or death, it is not objectionable for the court to inform the jury of the power of the court of pardons to override their verdict by an exercise of the pardoning power. *State v. Rombolo*, 565

POLICE POWER.

See GRADE CROSSINGS, 20, 21, 24, 25.

POOR.

Section 15 of the act for the settlement and relief of the poor (*Pamph. L.* 1911, p. 390), requiring certain relatives of any indigent person to provide relief for such person, is constitutional. *Stark v. Fagan*, 29

PRACTICE.

1. A case certified should state a concrete case. *Schreiner v. Grinnell*, 37
2. A motion to strike out a complaint under the Practice act of

*Practice Act.**Process.*

1912, for want of showing cause for action, is the equivalent of a demurrer in the former practice, and only admits facts well pleaded, and not conclusions of law arising from the facts stated. *Koewing v. West Orange*, 539

3. The proceedings of an inferior tribunal are reviewable upon appeal when the court below has jurisdiction, and by *certiorari* when it exceeds its jurisdiction. *Mellor v. Kaighn*, 543

PRACTICE ACT.

1. Under section 215 of the Practice act (*Comp. Stat.*, p. 4119), only fundamental questions may be certified to the Supreme Court; that is, questions the answers to which will enable the Circuit Court to render judgment for the one party or the other without any further proceedings in the cause on its part. *Von Norelly v. Carpenter*, 14
2. The rule or order authorized by section 252 of the Practice act (*Comp. Stat.*, p. 4128), when made, transfers such matters as come within its purview to the Supreme Court for its consideration and determination. *Ib.*
3. Under our Practice act plaintiff may join in one action a claim for breach of a contract with one for breach of the condition of a bond, given by defendants with surety, in guaranty of performance of the contract. *Cramp & Co. v. Doughty*, 288

PRINCIPAL AND AGENT.

The doctrine of ratification is not applicable except where an agent has assumed to act for a principal but without authority. It does not apply where one who makes a contract acts for himself with the knowledge of the

other party thereto. *Brown Realty Co. v. Myers*, 247

PRIVILEGED COMMUNICATIONS.

1. The meeting of the creditors of a bankrupt for the election of a trustee held by a referee in bankruptcy to whom the matter had been referred by the bankruptcy court, is a judicial proceeding, and a slanderous communication made by counsel for some of the creditors to the referee at such a meeting, concerning one of the candidates for election as trustee, if relevant and pertinent to the subject-matter under consideration, is privileged, and counsel is not liable in an action for slander although what was said was uttered maliciously. *Rogers v. Thompson*, 639
2. At such a meeting creditors are entitled to be represented by an agent, attorney or proxy, and one employed as attorney for a creditor is entitled to the privilege accorded to counsel in any judicial proceeding. *Ib.*

PROBABLE CAUSE.

See MALICIOUS PROSECUTION, 2, 3, 4.

PROCESS.

1. Process to appear before a legislative committee, regular on its face, issued by the chairman of such committee under a general authority conferred upon him by the committee, either expressly or by parliamentary usage, and either with or without specific authority in the particular case, is a summons to appear before such committee, the willful disregard of which is made a misdemeanor by *Pamph. L.* 1895, p. 162. *Comp. Stat.*, p. 2241, §§ 67, 68. *State v. Brewster*, 658

Public Utilities Act.

2. The failure of the defendants to appear at the place named in the subpoena was the culminating factor in the completion of their offence, and the defendants were then subject to indictment in that county, though they resided elsewhere. *Quare*: Whether such process is subject to collateral attack? *Ib.*

PUBLIC USE.

See HIGHWAYS, 3.

PUBLIC UTILITIES ACT.

1. The provisions of section 2 of the supplement to an act concerning public utilities, approved March 12th, 1913 (Fielder act. *Pamph. L.* 1913, p. 91), by which ten per centum of the expense of eliminating a grade crossing of a steam railroad used by a street railway may be ordered to be paid by the company operating such street railway, is within the legitimate sphere of legislation under the police power of the state. *Pub. Serv. Ry. Co. v. Pub. Utility Com'rs*, 24
2. Property merely desirable for park development around the railroad station cannot be ordered taken by the board of public utility commissioners under the act of 1913. *Pamph. L.*, p. 91. *Potter v. Pub. Utility Com'rs*, 157
3. The order of the board of public utility commissioners, in such a case, cannot be sustained under the acts of the legislature. *Pamph. L.* 1914, p. 490, or the act of 1911. *Pamph. L.*, p. 379, § 17b. *Ib.*
4. The Supreme Court, on *certiorari*, has power to review the testimony to ascertain whether or not the order is supported to

Quo Warranto.

any extent by the facts submitted to the board for consideration. *Ib.*

See also GRADE CROSSINGS, 2, 3, 4, 9, 10, 11, 12, 13, 14, 17, 18, 19.
STREET RAILWAYS, 1.

PUBLIC UTILITIES RATES.

1. The special franchises of a public service company are property, but property of a peculiar kind; the right of property in them is not absolute, but is qualified by the right of the state to fix reasonable rates. In determining the reasonableness of rates, no allowance should be made for the value of the special franchise in a case where it is not legally exclusive and where the state still retains the right to fix the rates. See opinion of the Supreme Court, 84 N. J. L. 463, and the per curiam affirmance by this court upon that opinion, reported in 87 *Id.* 597. *Public Service Gas Co. et al. v. Bd. Public Utility Com'rs*, 734
2. Where, upon the application of a municipality, the Board of Public Utility Commissioners have found the rate charged by a gas company unreasonably high and have in consequence prescribed a lower rate, which lower rate the municipality still thinks unreasonably high, the latter's remedy is by *certiorari* to procure the setting aside of the order fixing such rate, so that the way may be open for the establishment by such board of such still lower rate as shall be proper under the evidence. See the per curiam opinion of this court reported in 87 N. J. L. 705. *Ib.*

QUO WARRANTO.

1. A demurrer to an information in the nature of a *quo warranto*

*Quo Warranto.**Railroads.*

admits the charge of the information that the demurrant intrudes into and unlawfully holds and exercises the office, but where the information itself shows that a demurrant is entitled to the office, the averments are inconsistent and the demurrant is entitled to judgment. *Bonyng v. Frank*, 239

2. Informations in the nature of a *quo warranto* under our statute are of three classes: (1) by the attorney-general without leave of the court at his own discretion; (2) in the name of the attorney-general by leave of the court at the instance of any person desiring to prosecute; (3) under section 4 of the act where the question is of usurpation or intrusion into a municipal office or franchise, by a citizen who believes himself lawfully entitled to such office or franchise. *Ib.*

3. Even in the case of information in the nature of a *quo warranto* as to a municipal office or franchise, the title of the relator could not be put in issue prior to 1895. Under the act of that year (*Comp. Stat.*, p. 4214) it is not incumbent on the relator to put his own title in issue; but the defendant is permitted to do so, and the court will then determine which claimant, if either, is entitled to the office. *Manahan v. Watts*, 64 N. J. L. 465, explained. *Ib.*

4. In case of an information in the nature of *quo warranto* under section 1 of the act in the name of the attorney-general by leave of the court, any person desiring to prosecute may be relator; he need not himself claim the office; but leave of the court will not be granted unless the relator is acting in good faith in vindication of his own rights or those of the public or a portion of the public. *Ib.*

5. An information in the nature of *quo warranto* will lie jointly against several members of a board of trustees of a cemetery company. *Ib.*

6. Where an information in the nature of *quo warranto* shows that a cemetery company had fifteen trustees; that the terms of five only had expired and the terms of ten had not expired; that nevertheless an attempt had been made to elect nine as successors of the fifteen, a judgment of ouster follows a demurrer to the information as to any defendant who is brought into court, and not shown by the information itself to be entitled to the office. *Ib.*

See also CORPORATIONS.

RAILROADS.

1. In an action for damages against a railroad company for injuries sustained by the plaintiff because of the agent of the defendant closing the entrance doors of its train before the plaintiff was fully within the train, a charge by the trial court to the jury that "the duty of the defendant company through its agents and servants was and is to use reasonable care for the safety of its passengers upon its station platform and as they enter and leave their cars" is not, *per se*, erroneous; an objection to such charge does not raise the question whether or not the plaintiff was entitled to have the jury instructed that under the circumstances reasonable care was a high degree of care. *Blumenfeld v. Hudson and Manhattan R. R. Co.*, 580

2. The provision of the General Railroad law requiring that the secretary to the governor be carried free of charge is unconstitutional as to railroads operating under special charters previously

Recoupment.

granted and containing no such provision. *Penna. R. R. Co. v. Herrmann*, 582

3. Where a railroad company lands a passenger not at its regular station platform, but in a place where the surface of the ground is uneven, and the spaces between the rails of the tracks the passenger must cross to reach the station and street are at least five inches in depth, and in so crossing, without aid from the company's servants, or warning of the unusual conditions, the passenger is thrown and injured because of the condition, a motion for nonsuit, upon the ground that plaintiff had not shown that the construction of the platform and tracks was different from that in general use under like conditions, was properly refused. It is not a question of construction, but whether by acts of omission or commission the defendant neglected to perform its duty to provide a reasonably safe way for its passengers. *Smith v. Del., Lack. & W. R. R. Co.*, 643
4. Where the testimony of the plaintiffs presented a case from which the jury might reasonably infer that the destruction of the plaintiffs' timber land was due to a fire which originated in an accumulation of combustible matter upon defendant's right of way, ignited by defendant's locomotive, and the defendant presented proof to show that its engine was provided with the latest and most approved methods of arresting sparks and preventing fires, it was not error for the court to refuse to charge in effect that the care thus exercised by defendant relieved it of liability, or that the care it exercised in the supervision of its roadbed and right of way in effect exempted it from liability, since those questions presented the issue in the case and were for the

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determination of the jury. *Smith v. Del., Lack. & W. R. R. Co.*, 654

See also CARRIERS, 1, 2, 3.
GRADE CROSSINGS, 1-27.
MASTER AND SERVANT,
7, 8.
NEGLIGENCE, 11.

RAPE.

See CRIMINAL LAW, 7, 8, 9.

RECOUPMENT.

1. Although a party to a suit cannot be deprived of his statutory right to recoupment by the mere form of pleading as by declaring on the common counts, where the contract has been completely performed instead of declaring upon the express contract, yet where the implied contract declared on is in fact a different contract from that out of which the damages sought to be recouped arose, the claim of recoupment is excluded by the terms of the statute itself. *Weir v. Allen*, 597
2. The provision of section 64 of the District Court act authorizing recoupment not only of damages sustained by reason of any cause of action arising out of the contract, but also of damages sustained by reason of any cause connected with the subject of the action, was not meant to apply to a case where pre-existing causes of action had become merged in the one on which the plaintiff sues. *Id.*

RELEASES.

See FRAUD, 2, 3.

REPLEVIN.

In an action of replevin, when a demand for possession is neces-

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sary, a demand made upon the wife of the defendant is not sufficient to maintain the action against the husband. *Shapiro v. De Leuce*, 161

See also JURISDICTION, 2.

ROBBERY.

See CRIMINAL LAW, 12, 15.

SALES.

A party who purchases a crop of grain can acquire no better or different title thereto than the seller had at the time of the sale. *Cliver v. Harris*, 667

SCHOOLS.

1. Where the legal right of school teachers to have their salaries has been determined by judgment, the duty of the school board to levy the tax to pay the judgment becomes imperative, and *mandamus* will go against the representatives and agents of the school district to compel them to perform such duty, its power to raise the necessary funds being ample under *Comp. Stat.*, p. 4742, § 55. *Gowdy v. Paterson Bd. of Education*, 137
2. Under section 76 of the act relating to schools (*Comp. Stat.*, p. 4746), the custodian of school funds, who has on hand balances derived from the sale of school bonds authorized to be issued and which were issued for the purchase of land and the erection of school buildings, cannot be lawfully directed by the board of education to transfer such balances to the building and repair account and thus subjected to be used for repair of school buildings, &c. Since the statute makes no provision permitting such use of the unexpended balances, the

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general principle of law that a fund raised for a specific purpose cannot be applied to any other purpose applies, and the order of the board of education to make any use of the fund other than for the specific purpose for which it was raised is *ultra vires*. *Heston v. State Bd. of Education*, 486

SET-OFF AND COUNTER-CLAIM.

See TRUST COMPANIES, 2.

SIDEWALKS.

See TOWNSHIPS.

STATUTES.

1. Where the proviso of an act is separable from the remainder of the act and such proviso is unconstitutional, the proviso may be excised and the rest of the act allowed to stand. *Collins v. Sauer*, 139
2. Where the language of a New Jersey statute is clear and unambiguous, the courts of this state will not go back of the language of the statute and consider the construction placed upon a similar statute by a foreign jurisdiction, especially when there is a difference in the construction in courts of sister states. *Torrance v. Edwards*, 507
3. In construing a remedial statute, the court should always consider the mischief which the legislative body sought to remedy, as well as the remedy intended to be provided by it to cure the mischief. *Conservation and Development Bd. v. Veeder*, 561
4. The cardinal principle for the construction of statutes is that

<i>Statutes of New Jersey.</i>	<i>Statutes of New Jersey.</i>
they are to be so construed that, if possible, full effect shall be given to all parts of the statute. <i>Steel v. Freeholders of Passaic.</i> 609	Paterson and Ramapo, R. Co. <i>Pamph. L.</i> 1841, p. 97, § 11, 63 Union Railroad Co. <i>Pamph. L.</i> 1853, p. 480, 71
5. A statute ought upon the whole to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. <i>Ib.</i>	Chosen Freeholders. <i>Comp. Stat.</i> , p. 521, pl. 167, 31 <i>Pamph. L.</i> 1912, p. 619, 4 <i>Pamph. L.</i> 1914, p. 203, § 27, 512
See also GRADE CROSSINGS, 20, 22, 23, 25.	Cities. <i>Pamph. L.</i> 1902, p. 284, 122, 441 <i>Pamph. L.</i> 1907, p. 34, 98 <i>Comp. Stat.</i> , p. 1297, 403 <i>Pamph. L.</i> 1915, p. 12, 40
STATUTES OF NEW JERSEY.	Civil Service. <i>Pamph. L.</i> 1908, p. 235, 360 <i>Comp. Stat.</i> , p. 3795, § 57, 610 <i>Comp. Stat.</i> , p. 3795, § 58, 611 <i>Comp. Stat.</i> , p. 3807, § 87, 612 <i>Pamph. L.</i> 1915, p. 49, 610
Armories. <i>Pamph. L.</i> 1913, p. 502, 198	Commission Government. <i>Pamph. L.</i> 1911, p. 462, 269, 378, 444 <i>Pamph. L.</i> 1911, p. 462, § 16, 483 <i>Pamph. L.</i> 1912, p. 643, 444 <i>Pamph. L.</i> 1912, p. 649, § 6, 387 <i>Pamph. L.</i> 1913, p. 836, ¶ 4, § 4, 134 <i>Pamph. L.</i> 1915, p. 12, 40, 440 <i>Pamph. L.</i> 1915, p. 622, 484 <i>Pamph. L.</i> 1915, p. 659, 270
Bridges. <i>Pamph. L.</i> 1874, p. 90, 498 <i>Pamph. L.</i> 1891, p. 312, 498 <i>Pamph. L.</i> 1892, p. 435, 497 <i>Pamph. L.</i> 1896, p. 250, 498 <i>Comp. Stat.</i> , p. 309, § 29, 500	Condemnation. <i>Pamph. L.</i> 1900, p. 81, § 6, 330
Cemeteries. <i>Pamph. L.</i> 1844, p. 19, § 6, 256 <i>Pamph. L.</i> 1861, p. 28, 256 <i>Comp. Stat.</i> , p. 372, 245 <i>Comp. Stat.</i> , p. 391, 245	Conveyances. <i>Comp. Stat.</i> , p. 1553, § 54, 519
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<i>Pamph. L.</i> 1913, p. 576,		<i>Comp. Stat.</i> , p. 2229, §§	
235, 570		28, 29,	684
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<i>Comp. Stat.</i> , p. 1824, § 12,	193	67, 68,	659
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<i>Pamph. L.</i> 1898, p. 564,	279	64,	471
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<i>Pamph. L.</i> 1916, p. 385,	426	<i>Pamph. L.</i> 1915, p. 297, §	
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<i>Comp. Stat.</i> , p. 3805, § 82,	197	<i>Comp. Stat.</i> , pp. 4780-	
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<i>Comp. Stat.</i> , p. 3813, § 13,	546	Set-off.	
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<i>Pamph. L.</i> 1899, p. 96, §		Street Railways.	
78,	155	<i>Comp. Stat.</i> , p. 5021,	407
<i>Pamph. L.</i> 1903, p. 276,		<i>Comp. Stat.</i> , p. 5035, § 32,	410
§ 80,	155	Taxes and Assessments.	
<i>Pamph. L.</i> 1908, p. 442,	155	<i>Rev. Stat.</i> , p. 3320,	295
		<i>Comp. Stat.</i> , p. 5079,	296

<i>Statutes of New Jersey.</i>	<i>Street Railways.</i>
<i>Comp. Stat.</i> , p. 5083, 257 <i>Comp. Stat.</i> , p. 5109, § 30, 294 <i>Comp. Stat.</i> , p. 5115, 115 <i>Comp. Stat.</i> , p. 5135, pl. 384 56, <i>Comp. Stat.</i> , p. 5264, pl. 115 447, <i>Pamph. L.</i> 1913, p. 570, ¶ 3, 295	302; <i>Comp. Stat.</i> , p. 5021), obtains from a municipality an ordinance granting a location of street railway tracks, and accepts the same, a regulation of the rate of fares contained therein, if lawful and reasonable, constitutes a contract between the company and the municipality which during the life of the franchise remains inviolable, and it is incompetent for the board of public utility commissioners to impose upon the company an additional burden in violation of such contract respecting fares. <i>Atlantic Coast Elect. Ry. Co. v. Public Utility Board</i> , 407
Towns. <i>Comp. Stat.</i> , p. 5501, 457	
Townships. <i>Comp. Stat.</i> , pp. 5591-5592, §§ 40-42, 394 <i>Comp. Stat.</i> , p. 5620, pl. 102, 457 <i>Pamph. L.</i> 1914, p. 310, 729	2. An ordinance passed by a municipality pursuant to the General Traction act of 1893 (<i>Pamph. L.</i> , p. 302; <i>Comp. Stat.</i> , p. 5021), granting a location of street railway tracks, and providing therein respecting the rate of fare that "no more than five cents shall be charged by the company," gives the company, when accepted by it, a contract right to charge a five-cent rate, which rate cannot be reduced without the consent of the company. <i>Ib.</i>
Traffic. <i>Pamph. L.</i> 1915, p. 285, § 4, 431	
Trust Companies. <i>Comp. Stat.</i> , p. 5661, § 15, 46 <i>Comp. Stat.</i> , p. 5664, § 22, 550 <i>Pamph. L.</i> 1913, p. 282, 550	3. Where an ordinance passed by a municipality pursuant to the General Traction act of 1893 (<i>Pamph. L.</i> , p. 302; <i>Comp. Stat.</i> , p. 5021), granting a location of street railway tracks, contained a restriction that the fare in a stated territory shall be "no more than five cents," and such ordinance is accepted by the company, such contract is binding both upon the company and the municipality, even though the territory covered by such fare zone is partly outside the corporate limits of the municipality. <i>Ib.</i>
Veterans. <i>Pamph. L.</i> 1907, p. 37, 444	
Waste. <i>Pat. Rev.</i> , p. 179, 121 <i>Comp. Stat.</i> , p. 5789, 121 <i>Comp. Stat.</i> , p. 5790, 121	
Water Power. <i>Pamph. L.</i> 1868, p. 545, 208	
Water Supply. <i>Comp. Stat.</i> , p. 823, 647	
Workmen's Compensation. <i>Pamph. L.</i> 1911, p. 134, 99, 202, 220, 474, 533, 601 <i>Pamph. L.</i> 1911, p. 762, 220 <i>Pamph. L.</i> 1913, p. 302, 99, 601 <i>Pamph. L.</i> 1913, p. 308, § 2, 602	
STREET RAILWAYS.	
1. When a traction company, organized under the General Traction act of 1893 (<i>Pamph. L.</i> , p.	4. Where the plaintiff's case presents the fact that he was riding as a passenger upon the wagon of another, who performed the part of driver of a team of

Surrogates.

horses, attached to the wagon; that the wagon was struck at a road crossing in the evening by defendant's trolley car, propelled at a speed of from twenty to twenty-five miles an hour on a down grade; that the plaintiff knew nothing of the danger, because he was so seated upon the back of the wagon as to be ignorant of the situation; that the trolley car at the time the wagon approached within view of the crossing was several hundred feet distant, and gave no signal of its approach until it was within seventy-five feet of the crossing—*Held*, a nonsuit directed under the circumstances was error. *Doney v. Morris Co. Tract. Co.*, 651

STOCK.

See DAMAGES, 3, 4.

SURROGATES.

1. The surrogate of a county in probating a will acts judicially and holds a court; this court, however, is not one of general jurisdiction, but is an inferior tribunal of special jurisdiction. *Mellor v. Kaighn*, 543
2. When a surrogate grants probate of a will his power is exhausted and his jurisdiction over the subject-matter is at an end, and he cannot open or vacate his decree for any cause. *Ib.*
3. The jurisdiction of a surrogate, or surrogate's court, is purely statutory, extending to the probate of wills, the granting of letters of administration and guardianship, and certain other matters mentioned in the statute. *Ib.*

TAXATION.

1. On a valuation of railroad property, brought before the Supreme

Taxation.

Court, it was the duty of that court to examine the evidence and reverse the valuation of the state board in case of palpable error, hence, when that was done and the Supreme Court directed a reassessment, it was proper that further testimony on valuations should be taken. *Long Dock Co. v. State Bd. of Assessors*, 108

2. In valuing property of a railroad company, including all of its terminal yard and water front, property adjoining its main stem, and land used for car storage and similar railroad purposes, it is proper to consider the increased value imparted to the several parcels by their assemblage into a connected whole appropriate to a railroad terminal. *Ib.*
3. Land under water, owned by a taxpayer, may be joined to the upland for assessment or segregated into separate tracts in the discretion of the assessors. *Ib.*
4. If a right to reclaim, not exercised, exists, it may be regarded as an increment of value to the shoreward property. *Ib.*
5. The element of adjacency or proximity or accessibility to tidewater may extend within reasonable limits, more or less indefinitely inland, as an element of value, as where questions of convenient storage are involved, the situation with regard to tide-water and accessibility then becomes important. *Ib.*
6. In valuing property of a railroad company, including all of its terminal yard and waterfront property, other property adjoining its main stem and land used for car storage and similar railroad purposes, or other property similarly situated, may, for purposes of comparison, be considered by the assessors in ar-

- | <i>Taxation.</i> | <i>Taxation.</i> |
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| <p> riving at a valuation thereof, it being impossible to secure identical conditions, and substantially similar conditions being all that is required. <i>Ib.</i> </p> <p> 7. In assessing such property, cost of reproduction is a proper element to consider. <i>Ib.</i> </p> <p> 8. The claim that the railroad franchise was included in the valuation of the board—<i>Held</i> not supported by the evidence. <i>Ib.</i> </p> <p> 9. In assessing property, including all the terminal yard and water-front property of a railroad, other property adjoining its main stem, and land used for car storage and similar railroad purposes, a rule of valuing railroad property where railroading was unprofitable at or below ordinary values, and where railroading is profitable at more than such ordinary values, is, if applied to all railroad property, a uniform rule under the constitutional requirement. <i>Ib.</i> </p> <p> 10. The fact that neighboring property is valued at less than true value does not entitle a railroad, whose property is assessed at its true value, to have its valuation lessened on account of the undervaluation of its neighbor's property. <i>Ib.</i> </p> <p> 11. In assessing property, including all of the terminal yard and water-front property of a railroad, the admission of evidence of the valuation of terminal properties of other railroads as a criterion, while irregular, was harmless, the finding being supported without that evidence. <i>Ib.</i> </p> <p> 12. Under the provision of section 13 of the Railroad Tax act, which provides that if it shall appear that any assessment is excessive or insufficient, the court may reduce it or increase </p> | <p> it, or refer it back to the board of assessors, it is optional with the Supreme Court as a matter of judicial discretion to send back excessive valuations or to make such revaluations itself. <i>Ib.</i> </p> <p> 13. The extension of the pier line in the Hudson river in the year 1913 did not confer a title to the land under water between the old pier and new pier lines until it was reclaimed. <i>Ib.</i> </p> <p> 14. An increase of approximately seventy-five per cent. of the additional area valued as upland, for the mere privilege of reclaiming land under water—<i>Held</i> unreasonable. <i>Ib.</i> </p> <p> 15. The taxes required to be raised by the General School law for the support of the free public schools of the state are state taxes levied for the use of the state. <i>Society, &c., v. Paterson</i>, 208 </p> <p> 16. Property acquired by the Society for Establishing Useful Manufactures under an act entitled "An act to develop and improve the water power of the Passaic river" (<i>Pamph. L.</i> 1868, p. 545), is not exempt from local taxation under the provisions of the society's charter. <i>Pat. L., p. 104.</i> <i>Ib.</i> </p> <p> 17. The supplement of 1861 (<i>Pamph. L., p. 28</i>) to the charter of the Mount Pleasant Cemetery Company does not amount to an irrevocable contract to exempt property from taxation. <i>Mt. Pleasant Cemetery Co. v. Newark</i>, 255 </p> <p> 18. The exemption of cemeteries from taxation by the Tax act of 1903 (<i>Comp. Stat., p. 5083</i>) does not include a tract of land belonging to a cemetery company acquired by a separate deed and lying between high-water mark </p> |

Tax Sales.

and the dock line of a tidal river, separated from the other cemetery property by a railroad, when only a small portion of the tract has been filled in, and none is now used for interments or likely to be so used in the near future.

Ib.

19. By the provisions of the amendment of the general act concerning taxes (*Pamph. L. 1913, p. 570*), all buildings used for charitable, benevolent or religious purposes, not conducted for profit, and the land whereon they are situated necessary for the fair enjoyment thereof, not exceeding five acres, are exempt from taxation although owned by a corporation of a sister state. *Denville Twp. v. St. Francis Sanitarium,* 293

20. According to the terms of the same amendment, a charitable, benevolent or religious work is not conducted for profit where it is partly supported by fees and charges received from beneficiaries, provided the building is wholly controlled and the entire income therefrom is used for said charitable, benevolent and religious purposes. *Ib.*

TAX SALES.

1. Where the proceedings to make a tax a lien on lands are defective a writ of *certiorari* to review a sale of the land to enforce the lien will be allowed although the eighteen months' period for reviewing the sale have expired, as the only sales to which this limitation applies are sales to enforce a statutory lien, that is, one valid in law. *Bounds v. Chester Twp.,* 375
2. The statute relating to tax sales (*Comp. Stat., p. 5135, pl. 56*) gives the holder of the certificate of sale the right to immediate possession of the property and

Townships.

to the rents and profits from the date of the certificate, but this does not prevent the landlord from bringing proceedings to dispossess the tenant for non-payment of rent accrued previous to the making of the tax certificate. *Moreland v. Steen,* 383

TITLE TO LANDS.

1. A vendee is not obliged to accept a title substantially defective, and on rejecting the deed for good cause may demand and sue for the return of money paid on account of the purchase. *Eisler v. Halperin,* 278
2. When the sufficiency of a real estate title is in question in a court of law, that court may receive and consider evidence tending to show that the title is vulnerable in equity. *Ib.*
3. Delivery of possession is normally essential to the transfer of a good title, and a vendee may reject a title not accompanied by immediate possession, unless the agreement be otherwise. *Ib.*

TOWNSHIPS.

Under sections 40-42 of "An act concerning townships" (*Comp. Stat., pp. 5591, 5592*), providing for the method of assessing the cost of sidewalk improvement, an abutting owner can only be assessed with such part of the incidental expense of the work as bears the same ratio to the total incidental expense as the cost of labor and materials mentioned in the second subdivision bears to the whole cost of material and labor mentioned in section 40. Assessments for substantial grading, extra driveways for owners other than the one assessed, and for laying gutters, cannot be sustained under

Traffic.

the section named. *Newark Homebuilders Co. v. Bernards Twp.*, 394

TRAFFIC.

The provisions of paragraph 1 of section 4 of the "Traffic act" of 1915 (*Pamph. L.*, p. 285), requiring every driver of a vehicle approaching the intersection of a street or public road to grant the right of way at such intersection to any vehicle coming from the right, does not impose this duty upon the motorman of a street car. *Reed v. Pub. Serv. Ry. Co.*, 431

TRIAL.

1. It is error in law, if, in the charge of a judge to a traverse jury, a fact of moment clearly connected with the merits of the case is said to be in proof, when there is no testimony to support the assertion; and this in a civil as well as a criminal case. *Gerety v. N. Y. & N. J. R. R. Co.*, 175
2. A trial judge, sitting as a traverse jury, is only obliged to decide questions concerning which he is requested to make a finding. *Ruggles v. Ocean Accident, &c., Corp.*, 180
3. The submission of testimony on rebuttal of evidence which related to plaintiff's main case is a matter for the discretion of the trial court. *Mingoes v. Central R. R. Co.*, 226
4. Where no objection is made to a question asked a witness, and the answer is responsive, the motion to strike out part of the answer was properly denied. *Ib.*
5. Where a case has been fully tried including issues not perfectly pleaded and the complaining party has not been sur-

Trial.

prised, or suffered any injury, this court has the power to amend the pleadings to conform to the proof and should, in such case, in the interest of justice, exercise the power. *Van Houten v. Van Houten*, 301

6. In an action by a grandson to recover from the estate of his grandfather on an oral contract by which the grandfather agreed to leave a legacy to the grandson in consideration of services to be rendered, it is not error to permit proof of the relationship, for it bears on the probability of the making of such a contract, because a grandfather would, ordinarily, be more likely to contract to give a legacy to one of his blood than to a stranger. The inferences to be drawn from such circumstance is for the jury to settle. *Ib.*
7. Where the plaintiff, on a dark and foggy morning, approached a railroad crossing with his horse and wagon, and stopped, looked and listened for an approaching train, and after due observation neither heard nor saw one approaching, and the defendant maintained gates and a gateman at the crossing, and the gates were up, and the defendant met the situation thus presented by proof that the approaching engine bell was rung and the approach of the engine was discernible from various points at the crossing—*Held*, that the issue thus presented was one of fact, and was properly submitted to the jury. *Schnackenberg v. Del., Lack. and W. R. R. Co.*, 311
8. The rulings of the trial court, admitting and rejecting evidence at the trial of this case, were not error. They were within the discretion of the trial judge. *Manda, Inc., v. Del., Lack. and W. R. R. Co.*, 327

*Trust Companies.**Verdict.*

9. The trial judge has the undoubted right to make comments upon the testimony so long as he leaves it to the jury to determine the facts and draw their own conclusions. *Ib.*

10. The refusal of a motion to direct a verdict of acquittal at the close of the case for the state, where the case fails to show the defendant's guilt, is an error reviewable under sections 136 and 137 of our Criminal Procedure act, and the right to the review is not waived by the defendant because he thereafter proceeds with his defence. *State v. Bacheller*, 433

11. If counsel conceives that a pertinent legal principle has been omitted by the judge in his charge, he should request the desired instruction. *Lange v. N. Y., Susq. and W. R. R. Co.*, 604

12. When a party asks for an instruction to the jury which is partly good and partly bad, it is proper to refuse it altogether. *State v. Reilly*, 627

13. In a criminal trial counsel will not be permitted to sit by in silence and let incompetent evidence be introduced, cross-examine on and experiment with it, and at the close of the state's case, finding it to his disadvantage to have such testimony in the case, move that it be stricken out, and a refusal by the trial court, under such circumstances, to strike out such incompetent testimony is not reversible error. *State v. Koettgen*, 678

14. Where a general exception is taken to the court's charge, and error assigned on a portion thereof, which includes two distinct propositions of law, one sound and the other unsound, the assignment is ineffectual and will not be considered on a strict bill of exceptions. *Ib.*

See also EVIDENCE, 5.
PARDONS.

TRUST COMPANIES.

1. Section 22 of the act concerning trust companies (*Comp. Stat.*, p. 5664), amended *Pamph. L.* 1913, p. 282, authorizes the commissioner of banking and insurance, in certain circumstances, to take possession, as statutory agent, of a trust company's property and business and liquidate the same, and empowers him to prosecute and defend suits and other legal proceedings in the name of the trust company. *Roseville Trust Co. v. Barney*, 550

2. A person indebted to a trust company on a promissory note, and having a deposit to his credit therein when the commissioner of banking and insurance takes possession, is a creditor of the company, and as such entitled to set off his deposit against the amount due on the note, under the act concerning set-off. *Comp. Stat.*, p. 4836, § 1. *Ib.*

VERDICT.

A verdict by a trial jury that the "jury has agreed to convict the defendant guilty of murder in the first degree with recommendation of mercy by the court, if the court will accept," shows that the agreement of the jury turned upon a contingency which continued to exist when judgment was pronounced, and the state of mind thus evinced is inconsistent with the existence of a verdict; so long as such state of mind continued no conviction of defendant had been reached. *State v. Williams*, 234

VOLUNTARY ASSOCIATIONS.

See MANDAMUS, 5.

Waste.**Workmen's Compensation.****WARRANTY.**

See DAMAGES, 1.

WASTE.

1. It is settled law in this state that an action for permissive waste will lie under the statute of waste. *Comp. Stat.*, p. 5789. *Newman v. Sanders*, 120
2. Although the statute of waste gives no right of relief against the personal representatives of the deceased committer of the waste, it is to be inferred that the legislature had in mind that act in enacting the act of 1855 (*Comp. Stat.*, p. 2260, § 5), relating to the survival of actions. Consequently, an action for waste either committed or suffered to be committed survives against the personal representatives of the deceased committer of the waste. *Ib.*

WATER-SUPPLY.

See CONDEMNATION, 3, 4.

WORDS AND PHRASES.

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WORKMEN'S COMPENSATION.

1. The provision of the Workmen's Compensation act with relation

to weekly wages being taken to be six times the average daily earnings for a working day of ordinary length, excluding overtime, is confined to cases where the rate of wages is fixed by the output of the employe, and does not refer to cases where he received a fixed wage per day. *Conners v. Pub. Serv. Elect Co.*, 99

2. Where death results immediately from an accident, compensation under the Workmen's Compensation act should begin at the time of the death. The provision of section 13 of the act, providing that compensation shall not begin until two weeks after the accident, should be read in connection with section 14, and has no application to cases where deceased was killed instantly. *Ib.*
3. There is no provision in the Workmen's Compensation act authorizing the trial court to fix a specific day upon which the weekly compensation shall be paid. Where such a requirement would inconvenience the defendant an application for modification should be made to the trial court. Such a requirement is not sufficient ground for reversal. *Ib.*
4. Paragraph 19 of the Workmen's Compensation act provides that action under that act where death results from the injury shall be brought by the executor or administrator of deceased, or in case there is none, by such person as would be entitled to administration. *Ib.*
5. Paragraph 12 of the Workmen's Compensation act of 1911, relative to compensation to be paid to dependents in case of death, was amended by the act of 1913 (*Pamph. L.*, p. 302), and instead of specific percentages applied to specific groups of dependent relatives, substituted percentages based on the varying number of

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actual dependents within the degrees of consanguinity or limits of affinity set out in the act. Whether or not such persons are actual dependents is a question of fact. *Ib.*

6. Where an adult son gave all his money, which was more than the value of his board and lodging, to his mother for the common fund of the family, some of whom were themselves working—*Held*, that the family were deprived of the benefit of the wages of deceased by his death and all were actual dependents within the meaning of the act. *Ib.*

7. Decedent was employed by appellant as a route foreman, and on Saturdays delivered beer and collected moneys therefor. On a Saturday night, while delivering beer in a locality known to the police as one where drunkenness, assaults and murders occurred with frequency, he was shot and subsequently died from his wound. There was no proof that the employer had knowledge of the bad character of the locality where decedent was working, nor was there any proof of the identity or motive of his assailant. *Held*, that the employer was not chargeable with the risk decedent assumed by reason of some peculiar and extraordinary situation, unless it appears that he was aware of such added risk; and *Held*, further, that although if there had been testimony showing that the object of the attack was robbery of the employe, the employer would have been liable, the risk of robbery of a person known to carry considerable sums of money being a risk incident to the employment, yet in the absence of proof of motive for the attack, robbery will not be presumed to have been the motive thereof, as the motive may have been revenge or fancied wrong, or the shooting accidental.

Schmoll v. Weisbrod & Hess Brewing Co., 150

8. The supplement to the Workmen's Compensation act (*Pamph. L. 1911, p. 762*), providing that every contract of hiring then in operation shall be presumed to continue subject to the provisions of section 2 of the original compensation act unless either party shall, prior to an accident, in writing, notify the other party to such contract that the provisions of section 2 are not to apply, simply permits the parties to the contract to alter its terms and provisions, and provides a rule of evidence as to what shall be proof of the altering of such contract by mutual consent. The legislature has not, by this statute, impaired the obligation of the master and that of the servant arising out of the original contract of hiring. *Troth v. Millville Bottle Works*, 219

9. Actual knowledge by, or formal notice to an authorized agent of, a corporation is sufficient notice under paragraph 15 of the Workmen's Compensation act. *Pamph. L. 1911, p. 134. Ib.*

10. Where a petition was filed under the Workmen's Compensation act, and a day was thereafter fixed for hearing by the court, and the hearing was continued by an order regularly entered until June, 1914, and nothing further was done thereafter until September 25th, 1915, involving a period of over twelve months, when an order was made fixing a day for hearing—*Held*, that the proceedings under the act are intended to be of a summary nature, and the failure of the petitioner to move the hearing during the interim, warranted the defendant in concluding that the proceeding had been abandoned, and the order fixing a day under the circumstances

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is set aside. *Ringwalt Linoleum Works v. Liguor*, 452

11. Where compensation is sought under section 2 of the Workmen's Compensation act (*Pamph. L. 1911, p. 136*), the question of negligence does not enter into consideration, and it is not necessary that it be shown that the accident is one of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause. *Foley v. Home Rubber Co.*, 474

12. An employe, in going to a European country on his employer's business, set sail, to the knowledge of his employer, on a vessel sailing under the flag of a country then at war. While on the voyage the vessel was sunk by an enemy submarine and the employe lost his life. Held, that the death of the employe arose from an extraordinary risk which might reasonably have been anticipated by the employer, and that death resulted from an accident arising out of and in the course of decedent's employment. The fact that the vessel was sunk by the designed act of a belligerent does not put the case on any different footing than if the employe had lost his life in any of the other various ways recognized as the dangers incident to travel. *Ib.*

13. Where decedent was in her master's place of business in the course of her employment as stenographer, within a time during which she was employed, when a fire occurred which caused her death, the death was caused by an accident in the course of the employment. *Newark Hair and Bi-Products Co. v. Feldman*, 504

14. Where a fire broke out in the lower floors of the building in which the employer had his place of business, and over which he

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had no supervision or control, and the conditions of the premises for escape in case of fire were such as would warrant a conclusion that the danger to employes in case of fire, whether on the premises of the employer or on one of the floors beneath, was a danger to be reasonably anticipated by the employer, such a danger was one incident to the employment and an injury resulting from the fire was an injury arising out of the employment. *Ib.*

15. In the class of cases coming under the Workmen's Compensation act, the facts of each case must be considered free from the influence of the well-settled legal principles governing cases of negligence, and such cases must be dealt with in accordance with a state policy of social insurance, in which the doctrine of negligence has no abiding place. *Ib.*

16. Compensation for injuries to an employe is recoverable under the provisions of the Workmen's Compensation act (*Pamph. L. 1911, p. 134*) if the contract of hiring be made after that act went into effect, unless there was, as a part of the contract, an express statement in writing prior to the accident, either in the contract itself or by written notice from either party to the other, that the provisions of section 2 of the act were not intended to apply; which notice, in case of a minor, is required to be given by or to his parent or guardian. *Brost v. Whitall-Tatum Co.*, 531

17. Where a minor employe received his pay in an envelope, upon which were printed words warning him that the provisions of the act were not intended by the employer to apply to its contract of hiring with him, and the boy gave his wages to his father

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in such envelope, who (the father) after receiving it and with such notice in his mind permitted the boy to go to work afterward, the provision in the act as to notice that it was not intended to apply was satisfied. *Troth v. Millville Bottle Works*, 86 N. J. L. 558; *S. C.*, ante p. 219, distinguished. *Ib.*

18. Where a statute provides for the giving of a notice but does not prescribe the manner of its service, it is sufficient if actual notice to the person to be affected is conveyed to him. *Ib.*

19. The provision in section 1 of the Workmen's Compensation act (*Pamph. L. 1911, p. 134*), that an injured employe's right to compensation shall not be defeated upon the ground that he assumed the risks inherent in, or incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances (which ground of defence is, by the act, abolished), is constitutional. *Ib.*

20. To warrant a recovery under section 2 of the Workmen's Com-

pensation act (*Pamph. L. 1911, p. 134*, as amended by *Pamph. L. 1913, p. 302*) from an employer for the death of an employe, it must appear, among other things, that the employe's death was caused by (a) an accident, (b) arising out of, and (c) in the course of, his employment, and all these essential facts must be found by the trial judge, and must be contained in his written determination. *Dunnewald v. Steers, Inc.*, 601

21. Upon the review of a judgment against the employer for the death of an employe under section 2 of the Workmen's Compensation act (*Pamph. L. 1911, p. 134*, as amended by *Pamph. L. 1913, p. 302*), when it appears that there has been no finding by the trial judge that the death was by accident, nor that it arose out of, and in the course of, his employment, the Supreme Court should send the case back for a new trial and proper determination of facts, either upon the evidence already taken, or upon such as the parties see fit to put in. *Ib.*

See also LABOR, 1.



